UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 17 Cr. 548 (JMF)

JOSHUA ADAM SCHULTE,

DEFENDANT.

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MAY 3, 20022
9:15 a.m.

Before:

HON. JESSE M. FURMAN,

District Judge

APPEARANCES

DAMIAN WILLIAMS
United States Attorney for the
Southern District of New York
BY: DAVID DENTON
BY: MICHAEL LOCKARD
Assistant United States Attorneys

JOSHUA ADAM SCHULTE, Pro se

ALSO PRESENT: SABRINA SHROFF, Standby counsel for defendant
MATT MULLERY, CISO
DANIELLA MEDEL, CISO
PATRICE KING, CISO

(Case called)

THE DEPUTY CLERK: Counsel, please state your name for the record.

MR. DENTON: Good morning, your Honor. David Denton and Michael Lockard for the government.

MR. LOCKARD: Good morning.

THE COURT: Good morning.

MR. SCHULTE: I shall be appearing pro se.

THE COURT: I think the microphones are off for today's purposes so, please, keep your voice up.

MS. SHROFF: Good morning, your Honor. Sabrina Shroff, standby counsel to Mr. Schulte.

THE COURT: Good morning, and welcome.

Again, because I think the microphones are off, so that I can hear you and court reporter can hear you, just keep your voices up.

We are here in connection with a variety of things, the most significant of which is the sort of Section 6 issues, but before I turn to that a couple other items -- open items and new items. One, [redacted]

[redacted]

[redacted]

[redacted]

THE COURT: With that, let me deal with the two open items from the omnibus motion, they are the motion for disclosure of additional information or materials relating to the polygraph exam and materials relating -- actually, I guess there are three issues, materials relating to the CIA chats and e-mail metadata and then the forensic crime scene which I will get to later.

With respect to the polygraph, the government filed a classified letter [redacted] I guess what I am not clear on is what marginal value any of those materials have beyond the transcript that was already disclosed and, indeed, how this could be used at all except for Mr. Schulte to testify, if he were to testify, that he willingly took a polygraph and had no qualms about doing so, for which the materials themselves wouldn't be necessary.

So, Mr. Schulte, do you want to?

MR. SCHULTE: Yes. So the polygraph --

THE COURT: Just keep your voice up.

MR. SCHULTE: Yes. Has the government -- I haven't received the response so is that something that the government has?

THE COURT: Do you have a copy of it Mr. Denton.

MR. DENTON: No, your Honor; and we actually believe it is properly submitted *ex parte*. The details about what

specific information is retained about polygraph is -- we have been advised -- considered also quite sensitive and so that's the reason why we made the submission *ex parte*.

THE COURT: I overlooked that. OK. And can you elaborate on that to the extent that you can in this setting, why Mr. Schulte can't be privy to what's in this?

MR. DENTON: Again, your Honor, I think my understanding, as it has been conveyed to us, is that what information is collected, how it's documented, how polygraph decisions are made are themselves closely guarded things that are not known to CIA employees for precisely the reason that they do not have the ability to game the system or otherwise be aware of what information goes into the polygraph decision-making process. So, given that, we do not think that the information is relevant. The fact of its existence is also not relevant to the defendant.

THE COURT: So, Mr. Denton, with all due respect, I am looking at the letter and it's described at a level of generality that I find it very hard to understand what would be compromised by sharing it with Mr. Schulte.

MR. DENTON: I think, your Honor, there are some parts of it that we can describe and I think perhaps just sort of an additional level of generality to say that [redacted] and then associated documentation, that much I think we can say. I'm a little bit

taking my own marching orders here, your Honor, in terms of what is considered sensitive and what is not, and I'm trying to be careful about it. So I understand the desire to have a reasonable discussion about this, I'm just trying to be careful myself as well.

THE COURT: OK.

Mr. Schulte?

MR. SCHULTE: Yes. As an initial matter, I don't think that's the proper standard for determining whether it should be produced to me, and the precautions that they're saying there is really no difference between, you know, the results from this polygraph and, say, other polygraphs that are presented. So I really think in order for me to answer the -- in order for me to answer the Court, I really need access to the letter to be able to respond.

Standby counsel notes that also, just because he has marching orders from the CIA, that's not the standard. As the Court noted, Why? What is the reason for not disclosing that information to me so that I can properly present an argument and rebut what the government is arguing. Your rules require them to at least ask permission before filing the *ex parte* submission which it doesn't appear that they've done.

THE COURT: Well, in fairness, it is labeled *ex parte*, I just frankly overlooked that in part because I didn't see anything in here that would suggest that it should be *ex parte*

but, having said that and putting the procedural question aside of whether it should or shouldn't be *ex parte*, I mean, Mr. Denton has disclosed that [redacted] of certain things. The question is what possible use you could make of any of that since the -- again, I think the only admissible information or facts here would be that you took -- you willingly took the polygraph and had no qualms about doing so. It was never adjudicated, so in that respect there is no results to be admitted and, in that event, they don't have any results in their possession.

So the question -- and I recognize that you are shooting a little bit in the dark given that are you not privy to the particulars although, candidly, I am not privy to much of the particulars either having read the letter -- is what use or relevance any of that has beyond the transcript that's already in your possession.

MR. SCHULTE: So there is three or four issues that I initially wrote regarding the polygraph. I think first is it is proper Rule 16 because it is a medical test so that falls under the Rule 16 information.

The second big point I made in my argument was the polygrapher informed me specifically that the polygraph results were in and the adjudication is simply for the re-investigation so there should at least be some kind of evidentiary hearing or

some way for me to get this information from the polygrapher because my understanding, and from my understanding for [redacted] It is a common occurrence; people fail the polygraph, they have to retake it [redacted] So in my experience and with other CIA employees, [redacted] So that did not happen. The polygrapher told me I passed the polygraph [redacted] and what the government keeps referring to as adjudication is what they refer to as the entire investigation. So the entire investigation was never adjudicated so they have multiple investigations, the polygraph is just one small point of that. So my understanding is the polygraph results came in, I passed the polygraph, but they did not finish the entire re-investigation.

So I believe the polygraph results would be admissible for several reasons. The first is the biggest reason is that this polygraph is significantly different from a typical polygraph and I believe that the improvement the CIA has made would show that this one would be admissible in Court, and the second thing is this is not a typical situation. The reason polygraphs typically aren't admissible is because you are taking it specifically for the Court -- for the proceedings,

right, criminal proceedings, or you hire your own. This was not done regarding, with respect to any criminal proceedings, this was done with regard to the CIA and the CIA's trust in me. So the results from that polygraph basically say that the CIA's polygraph that they used to protect National Defense Information, National Security Information, that I passed this polygraph I believe would be admissible to that fact, the fact that the CIA would, based on their polygraph results, trust me and that they would acknowledge I did not, you know, commit any security violations during this time.

THE COURT: Two responses.

First, under Rule 16 it is not sufficient or enough that it is just a test conducted, it also has to be material in preparing the defense or the government intends to use the item in its case-in-chief. Obviously the government doesn't intend to use any of these items and the question I had for you is why is this material and I'm not at the moment persuaded that you have made that case. I'm not aware of any authority that differentiates a polygraph for purposes of a criminal case or some other purpose and its admissibility, nor have you cited any case that supports that proposition.

Be that as it may, let me just confirm with Mr. Denton, I don't know if adjudication is a technical term here or if there is some results that are different than adjudication that have not been disclosed to Mr. Schulte that

maybe he is just laboring under a misimpression that there are results that could be shared separate and apart from a, quote unquote, adjudication. But can you just clarify, are there any results of the polygraph test?

MR. DENTON: No, your Honor.

THE COURT: Great. So then I think this issue is put to rest. You have the transcript. Again, I think at most, as far as I can see, the only use that you could make of any of this is that you took the polygraph and had no qualms about doing so. I don't think your own statements to the polygraph examiner -- hearsay -- is offered by you and there are no results so we don't need to adjudicate or litigate the admissibility of results so the remaining information, I just don't see how it's material let alone admissible and, given that, the motion is denied.

The second issue is the metadata issue that the government responded and did cc Mr. Schulte so I assume you have a copy of that Mr. Schulte, is the government's letter of April 29th?

MR. SCHULTE: That's correct.

THE COURT: So do you wish to respond, say anything on this score? The government's representation is that you have the metadata for all of the communications that have been deemed relevant and that the metadata wouldn't contain the sorts of information that you indicated you needed it for,

[redacted]

[redacted]

MR. SCHULTE: So what the government provided to us were simply, like, PDFs, they're PDFs of the e-mails and messages so they're not in the original format so that is what I was requesting, is that Sametime and Outlook obviously have their own format for the messages so they should pull those out and actually provide them in the original format because there is metadata associated with those that are relevant, there is just no reason to simply print these as PDFs provided to me and regarding the relevant e-mails and Sametime messages, there is no reason that they can't pull the relevant e-mails and basically provide them in the original format.

THE COURT: So the last sentence of the second paragraph states the e-mails and Sametime messages already produced to the defendant in classified discovery contain all available metadata associated with those e-mails and messages.

MR. SCHULTE: Yeah, that's not correct. Yeah, because they're only provided in PDF form, they're not provided with the original metadata. PDFs don't -- they converted the file, they took the e-mails and messages and they went to print and they printed them as PDFs and they presented a PDF to us so they don't contain the metadata from the original encoding of the messages.

THE COURT: Mr. Denton?

MR. DENTON: Your Honor, our understanding, based on our communications with the people responsible for storing this, is that that header information that is included in each of the messages is all the metadata that there is, that there isn't something else. It is true that they were produced in PDF format and not a PST or something like that but, again, like I said, we specifically asked about whether there would be any other metadata and we were told all that there is are the headers.

MR. SCHULTE: The big question is or the major point here is that that is not in the original format and I don't believe, from my experience with the PST and Sametime files that they do contain additional data associated with those files but, regardless, they should at least provide the original data. They have it so what is the reason that they cannot simply produce the original in the original format to me?

THE COURT: So Mr. Denton, that was the question I was going to ask; that if the PDF contains all of the available metadata, why can't the original with the actual metadata, embedded within it, whatever that may mean, why can't that be produced? In other words -- correct me if I misunderstand -- but my understanding is that Mr. Schulte has been given, qucte unquote, all relevant communications as well as all of his own communications, so the only thing so which he is not privy are

communications from others to him which Judge Crotty previously blessed as appropriate and the question here is the metadata and there is metadata that -- communications that were already disclosed. Your position is that he has that, albeit in PDF form, and the metadata of the communications that he is not privy to. Focusing on the former, that is the things that have already been disclosed to him, if he already has that metadata, albeit in printed format, what's the harm giving it to him in the original format?

MR. DENTON: I think there is two different categories, your Honor.

With respect to chat messages, it's literally not possible to give it to him in the original format. [redacted]

With respect to the e-mails, I think that is possible. It is likely to be a pretty significant undertaking, mostly because I know that the triage process of identifying his e-mails and the relevant e-mails was done after they had already been exported to PDF so it wasn't like this was done in a PST that is sitting there that we can hand over, we have to go back to an e-mail pull to sort of re-cull it down to what's

already been produced. I don't think that would be a problem from a sensitivity perspective but I think here, too, we then get to a question of relevance and whether this is something that is appropriate to require the government to do under Rule 16. He has the content of his statements, those are all reflected in the e-mails. It is not entirely clear what relevance some other form of metadata has. Like I said, I'm not saying that this is a particularly sensitive thing but I do think it would be a significant amount of work to go back to at this stage.

THE COURT: Mr. Schulte?

MR. SCHULTE: Yes. This is not something new, we have been asking for this for a long time, and basically the original format is how the data should have been provided to begin with so the fact that the government, you know, provided it in a different format to begin with, the government should have provided it in the original format from the beginning.

THE COURT: What difference does it make to you? If you have the information and you can make use of the information, what could you do with the original format that you can't do with what you have been given?

MR. SCHULTE: Like, I mean, the biggest issue is we are coming back to the metadata. I know the government keeps saying that there is no additional metadata in it but from my experience with the PST Outlook file is it does contain this

information. I don't know if you have seen when you use Outlook, it tells you whether or not a message has been read or not. That data is being stored somewhere. So it is the same with other features and other things that were enabled on my Outlook inbox. The fact that you can do things, the features that are enabled, tells you that that data is being stored. Where is that data being stored? It is being stored as metadata as part of the e-mail. So I don't know if the Court wants me to get an expert to testify about how Outlook works and that this metadata exists but that's basically what it comes down to.

THE COURT: I'm not suggesting that you need to do that but I think you do need to demonstrate to me that there is some additional information or use that you can make of the original format metadata that you can't make of the metadata that the government says it has provided to you and I have no basis to second guess Mr. Denton's representation that that metadata is the entirety of the metadata associated with each of those messages. So if you have a basis to tell me otherwise, short of your -- quote unquote -- understanding whether it is in the form of affidavit or otherwise I will certainly revisit it. But, unless you can make a detailed showing that there is some information that the government should have in its possession that's not disclosed and/or some reason the original format would be usable by you as the

information that has been provided is not, I don't think there is any basis to compel the government to produce anything else.

MR. SCHULTE: OK.

THE COURT: So for that reason it is denied without prejudice to renewal, based on one or the other of those showings and we will take it from there.

To the extent that the request is for the communications that Judge Crotty had previously blessed non-disclosure of, namely the -- quote unquote -- non-relevant communications, I see no basis to revisit that based on the government's representation that the metadata would reveal or contain the information of the sort that Mr. Schulte says he needs it for namely when he accessed the system, when things were read and on and so forth.

So, for that reason, I think to the extent that Mr. Schulte needs it, it is the relevant communications, those have been provided based on the government's representation, the metadata has also been provided, and unless Mr. Schulte can demonstrate in one of the ways I have described a need for anything beyond what he already has, I don't see any basis to order the government to do anything further.

With that, again, I am tabling the forensic crime scene issues for the moment, we will circle back to that at the end I think. Let's turn to the Section 6 issues.

For starters, with one exception to which I am going

to reserve judgment, I will adopt all of Judge Crotty's prior Section 6 rulings. That decision is not based solely on adherence of the law of the case. So that certainly does provide a basis to do so. The doctrine, "does not constitute a limitation on the Court's power, but merely expresses the general practice of reopening what has been decided." *United States v. Birney*, 686 F.2d 102, 107 (2d Cir. 1982). Again, the law of the case certainly looms large here, but separate and apart from that, after reviewing the prior rulings in detail, I conclude that they were the product of a thorough and careful CIPA process and that Mr. Schulte -- again, with one exception that I will mention in a moment -- has not only provided no basis to revisit them but has not even argued that they should be revisited in anything other than a conclusory fashion. The one exception is Judge Crotty's ruling regarding the witness security measures to be used at trial. I think that's Docket no. 293 and see also Docket no. 260 and 263. I have already issued an order on that.

The bottom line is I think the government needs to make some additional showing with respect to the need for those measures today as opposed to two-plus years ago, and I also think that the press and the public need to be given an opportunity to weigh in on that. So, on those issues, I will reserve judgment. Again, that's really the only prior ruling, Section 6 ruling of Judge Crotty's that Mr. Schulte takes any

particular issue with and I will reserve judgment, pending the government's additional submission on that and hearing from members of the public or press at the May 18 conference. So with that one exception, all of his prior rulings are adopted.

Turning to the new CIPA issues.

MR. SCHULTE: Your Honor?

THE COURT: Yes.

MR. SCHULTE: One minor thing on that. Previously there were a couple things that were argued that I brought today to bring up with the Court that wasn't discussed before; one of them is the Michael memo, and the other I did mention in the CIPA 6 was the audio and video recordings. So I don't know -- those are the only two specifics that I wanted to bring up to the Court so I don't know what the procedure is for those documents.

THE COURT: So this is the first I am hearing of the Michael memo and in that sense I don't have any idea what you are talking about. The audio recordings are on my agenda of items to address so I will give you an opportunity to be heard on that. There, too, I will confess I don't quite understand what is at issue or what we are talking about but why don't we turn to that in due course and I will give you an opportunity to be heard. All right?

MR. SCHULTE: OK.

THE COURT: Turning to the new CIPA issues that were

framed by the Section 6 briefing and Mr. Schulte's Section 5 notices, I guess there are several sort of legal issues looming here that I think require discussion more than, and in that sense, candidly, it is not clear to me we couldn't have done this in open session but I think out of an abundance of caution it makes sense we do it here so we can speak freely.

One issue seems to be -- I think we have now squarely joined issue on where there is a prior public disclosure of potentially classified or closely-held information, whether that means that it's no longer national defense information. I agree with the government in one respect which is that Mr. Schulte is not going to be allowed to argue to the jury that it would violate his First Amendment rights to convict him of the offense. He is not going to be permitted to argue to the jury that they should be scared about their own First Amendment rights if he can be convicted of this, you know, then the First Amendment is implicated or what have you. Those are not proper arguments to be made to the jury. Mr. Schulte previously moved to dismiss the count on the grounds that it violated the First Amendment. I denied that as applied to him, I adhere to that ruling, I see no basis to revisit it and, in any event, that's not an issue for the jury, that's an issue for me.

That being said, I don't think the government directly responds to what I understand the heart of Mr. Schulte's

argument is, which is not so much the constitutional argument that it violates the First Amendment as an argument about an element of the offense or multiple elements of the offense. That is to say, I take it the government does not dispute that one of the elements of the offense that is charged is that it has to prove that the information at issue is, quote unquote, National Defense Information. Is that correct?

MR. DENTON: Of course, your Honor.

THE COURT: So what I understand the argument really is, is that by virtue of the fact that it was already public and perhaps even confirmed to be the CIA information by the government -- and that's one question I have here -- that it cannot be National Defense Information because it was public. Secondarily, and we will get to this, there is an argument that either it was National Defense Information or not, that to the extent that the government has to prove some measure of intent or willfulness, that Mr. Schulte's -- I will put it this way although I don't think he put it this way -- that Mr. Schulte harbored a good faith belief that the information was not National Defense Information because it was previously public or otherwise, then that would be essentially a complete defense to the charge.

That is sort of what I understand to be the heart of his argument which I think is different from the way the government has characterized it and it seems to me that is a

fair argument -- that is to say, well, again, two separate issues: One, National Defense Information; and two, what Mr. Schulte's state of mind is with respect to that issue and let's take those up separately.

The is it National Defense Information front, I guess one factual question I have is at any point between the initial leak, that is to say publication by Wikileaks and the disclosure underlying the MCC charges, was it confirmed by the government that the information on Wikileaks was in fact government information, CIA information, National Defense Information? Relatedly, what steps did the government take to essentially keep that information closely held given that it had been revealed?

MR. DENTON: So to take those in two steps, your Honor: First, no, [redacted]

[redacted]

THE COURT: So, Mr. Schulte, at page 5 your brief you state: The CIA and the government publicly acknowledge the Vault 7 information derives from the CIA which constitutes disclosure.

What is the basis for that assertion?

MR. SCHULTE: That's correct.

So, I have here press releases from the Department of Justice that I can provide to the government and to the Court but the government's press release and indictment of me is a public acknowledgment that the material belonged to the CIA. So the question before the government wasn't does the government still consider this classified, it is has the government acknowledged that this belongs to the CIA. And the government has acknowledged it belongs to the CIA, it was in the press release and they indicted me for the crime saying this material belonged tore CIA and I stole it from the CIA. So those two things happened before the MCC superseding indictment.

THE COURT: Can you give my deputy a copy of whatever the press release may be and provide it to the government as well?

MR. SCHULTE: I also have -- so, in addition to the government's allegations that the government continued to keep the information protected or secret, I have a series of five or six articles where various entities from the New York Times published about this information. The government did not request the New York Times to take the article down or return the information. They did not indict these people for basically transmitting this information so I believe all of this shows that the government did not do everything that they could to keep the information secret. All these people are discussing it, it is circulating through the Internet, and then they indict me for it and no one else and they're not asking these organizations to return the material. I think that's proof that the information is not closely held by the government.

THE COURT: Let's take this in turn.

Mr. Denton, I guess the question arises, Is this case not a confirmation of some sort that the information is government information to the extent that the premise is that it is National Defense Information and it follows that it came from the government? Is that not some form of confirmation that would change the analysis here?

MR. DENTON: So, your Honor, [redacted] but if the Court looks at the difference

between the S2 indictment -- or really the S1 indictment is the relevant one here, the first one that included the espionage charges, and the S3 that post-dated the trial, the S1 and even the press release are abstract and don't acknowledge what the nature of the information was, what particular information was at issue. There is a reason for that. [redacted] The fact that that information came from particular components at the CIA was not otherwise publicly acknowledged by the government until the trial in the last case.

THE COURT: And trial in the last case post-dates the MCC?

MR. DENTON: Yes.

MR. SCHULTE: This press release on June 18, 2018 clearly says: Joshua Adam Schulte charged with the unauthorized disclosure of classified information and other offenses relating to the theft of classified material from the Central Intelligence Agency. That, in and of itself, is a confirmation that the materials derived from the CIA and the government believed that it was classified information, so.

THE COURT: But I think Mr. Denton's point is, number one, it doesn't actually specify what the material was, it just charges that you leaked National Defense Information; and number two, I mean, let's say there is a universe of materials that is published on Wikileaks and you are charged with a leak

in connection with it. It doesn't necessarily mean that everything on there is classified or that the government will confirm that all of it came from the CIA but unless it specifies and confirms that a particular thing came from the CIA or the government, how is it confirming the fact of -- how is it confirming?

MR. SCHULTE: It is simply confirming that Wikileaks didn't publish anything except for the Vault 7 [redacted] information that it says came from the CIA. So, by indicting me -- and it is not just this, I mean, there is court appearances, public court appearances where the government recognizes this Vault 7, [redacted] from Wikileaks that I can pull up as well. It is not just this. From the beginning up until the MCC counts it has been publicly acknowledged that this is -- the Vault 7, [redacted] Wikileaks disclosures are from the CIA. I can pull additional court appearances or documents from the government if the Court is not persuaded by this information.

THE COURT: Is there anything prior to the first trial where the government specifically confirmed that some particular information or document on Wikileaks came from the CIA, from the government, or are you relying solely on the fact that the indictment and the charge that you were charged with leaking National Defense Information?

MR. SCHULTE: No, there were -- like I said, the

government -- they didn't acknowledge any specific document except by saying the Vault 7, [redacted] Wikileaks disclosure in general. They charged me with those. They specifically said that the charges are related to the Wikileaks Vault 7, [redacted] disclosure, so therefore referring to all of this stuffs Wikileaks posted involving Vault 7 [redacted].

They also -- my previous lawyer, they informed him, because he wasn't cleared at the time, he didn't have a security clearance -- that he was informed of it. Other public -- there has been other public acknowledgments that this material, Vault 7 [redacted] material from Wikileaks is CIA information. I can pull other transcripts. I can have my previous uncleared lawyers submit uncleared affidavits. There is a wealth of information showing that the government acknowledged that this information came from the CIA.

THE COURT: Well, I guess to me there is distinction saying that you are charged with the Vault 7 [redacted] information and specific confirmation that a particular document or item of information came from the CIA and qualifies as National Defense Information. If the government hasn't officially confirmed that, I mean, I think the government is essentially resting on the proposition that unless there is an official confirmation out there, [redacted]

[redacted] And if that is the case then that is a quantum of information that is a significant and material one, no? And that's different than saying, by virtue of the leak that you were involved in leaking National Defense Information without specifying what in the Vault 7 and [redacted] disclosures or publication is, in fact, the National Defense Information.

MR. SCHULTE: Well, my position is that they can't say that the Vault 7, [redacted] disclosures are from the CIA and then also say, well, we are not confirming which specific documents are [redacted]

[redacted] if you don't want to do that, they shouldn't have said this is from the CIA, this is Vault 7, [redacted] information from the Wikileaks and acknowledge that. [redacted]

[redacted]

THE COURT: But let's say, just as a hypothetical, let's say that the alphabet is classified information. OK? Or let me put it differently. Let's say that several letters in the alphabet are classified and Wikileaks publishes the entirety of the alphabet and the government charges somebody with leaking that information to Wikileaks and saying that they compromised -- they shared, disclosed National Defense Information but doesn't specify which of the letters in the alphabet that Wikileaks published is in fact the National Defense Information. Presumably they have to to the grand jury that returned the indictment, but they don't confirm to the public. They simply confirm to the public that in connection with the alphabet leak disclosure, that contained National Defense Information. If they don't confirm which of the letters of the alphabet are classified, they're not actually confirming -- that, yes, they're confirming at some level of generality that something in there is ass classified, closely-held National Defense Information, CIA information, whatever the case may be, but unless they specify which of the letters they're talking about, they're not actually officially confirming to the world at large what portions of the alphabet are actually legitimate and classified information.

MR. SCHULTE: I think there is two points to that. The first is the analogy of all the letters doesn't come into

play because there is no information that the entire Vault 7 [redacted] is derived from a single source of information. Right? So it is not really -- it is more like, OK, letters Y and Z, so there is only two things that Wikileaks releases, there is not really -- there is no way to get down to specifics and say -- there is basically no way for the government to say this specific page is not CIA material [redacted]

The other thing is even by disclosing it to a grand jury who are uncleared, I think that is also a disclosure anyway. You know, these people are not cleared and you are telling them that this information comes from the CIA. That also constitutes disclosure anyway. But, like I said, the big picture, the most important thing is the Vault 7 documents, [redacted]

THE COURT: So I have not reviewed the grand jury minutes so I don't know the way it was presented but let me modify my statement. I would guess that an agent can simply testify and say, *I have reviewed these leaks and they contain*

information that was closely held by the CIA and so on and so forth, and that would probably suffice for a finding of probable cause. Whether it suffices at trial is a different question. In that sense, I'm not presuming that the disclosure was made to an uncleared grand juror.

But, Mr. Denton, do you wish to respond to Mr. Schulte?

MR. DENTON: So, first of all, your Honor, with respect to the sort of the point that they [redacted]

[redacted]

I do want to be clear, with respect to the timing on some of the disclosures, there was additional information beyond what was in the affidavit that was declassified and disclosed in connection with some of the litigation in the summer of 2019 with respect to the motion to suppress. That all post-dates the MCC conduct which ended in October of 2018 as charged in the indictment.

I think, also, CIPA contemplates expressly this sort of process that took place here in which the government is often forced to charge these things in generality and then is required to provide specific classified notice of the classified information at issue under Section 10, and it is the sort of vagueness of the first indictment, which is necessary to sort of preserve the refusal to confirm or deny, that is why the government provided detailed Section 10 notice, provided a lengthy response to the defendant's demand for a bill of particulars. It was necessary to provide that information to him because the indictment, frankly didn't, because it was not a public acknowledgment that the government was prepared to make at that time.

THE COURT: Let me ask you, Mr. Denton, the instructions on this that Judge Crotty gave at the first trial, did you take issue with those? Do you think those correctly state the law?

MR. DENTON: Yes, your Honor. With respect to the National Defense Information, we do.

THE COURT: Can we drill down on what they mean? So, to the extent relevant, the instructions -- and I think these are consistent with *Squillacote*, the Fourth Circuit case, I think would you agree that where information has been made public by the United States government is found in sources lawfully available to the general public is not closely held,

correct?

MR. DENTON: Obviously.

THE COURT: And your position is that it has not been made public by the United States government, it is it was made public unlawfully by someone who leaked it.

MR. DENTON: That's correct; despite efforts by the government to safeguard it.

THE COURT: OK. Similarly, where sources of information are lawfully available to the public at the time of the claimed violation and the United States government has made no effort to guard such information, the information itself is not closely held.

Again, you agree with that proposition?

MR. DENTON: Yes.

THE COURT: And your position here is that it both was not lawfully available to the public at the time of the MCC leak and the government was taking -- making effort to guard the information? What's the precise argument?

MR. DENTON: Yes, your Honor. So it is both.

I think there is a temporal question with respect to the government's efforts to safeguard it that is a little bit opaque. We are all here laboring with relatively little case law and what constitutes "closely held" but I think there is two relevant points. The first is what did the government do to safeguard the information before it became public in any

way, this is sort of the *Heine* scenario in which the government just simply didn't do anything to stop anybody from publishing the information.

THE COURT: *Heine* is an easy case. I think *Squillacote*, frankly, is not that hard a case. I think the question here is at the time of the MCC leaks where the information is already out there, [redacted], what impact does that have on the MCC leak charges. And I think that's actually a complicated question, and if the government does confirm at some point between the initial leak and the MCC leak that this is government information, then I think there is reasonable argument that this case is very different than *Squillacote*.

MR. DENTON: I think that's true, your Honor and part of the reason for that that we talked about in our reply is if that had been the case, that would have relieved the defendant of his obligations under the secrecy agreement. If the publication is acknowledged, if the discussion of this is authorized by the U.S. government, then he's not bound by the provisions of his secrecy agreement that prevent him from discussing any classified information unless authorized.

THE COURT: But let me press you on that because, as that suggests, that something is National Defense Information for Mr. Schulte, that would not be National Defense Information

for the New York Times and how can that be the case? In other words, the definition of National Defense Information would seem to be independent of who the leaker is. It is either National Defense Information or it is not and it can't turn on the obligations or lack thereof of the person who is linked to that.

MR. DENTON: So, I recognize the intuitive appeal of that, your Honor. I think *Rosen* sort of went the opposite direction. *Rosen*, in that case in adopting a very strict standard for whether information had been closely held or was damaging to the national security, talked about how the First Amendment interests that animate these limiting principles are different based on the relationship of the person to the government. Like I said, I'm not saying that I dispute the obvious logic of the Court's point, that it is either NDI or it isn't regardless of who is talking about it.

THE COURT: I think that's a different question from whether the prosecution would violate the First Amendment. That's where I think the import of Mr. Schulte's obligations come in. As applied to Mr. Schulte, I don't think there is any conceivable First Amendment argument because he did have independent obligations that the New York Times, for example, would not have. But that is a different question, meaning whether it is NDI or not NDI, and in that instance it doesn't seem that that would turn on who the person is. I think that

gets to the second point that Mr. Schulte raised earlier which is 2017 Wikileaks publishes this information. The New York Times publishes articles about it; Mr. Schulte writes an article, if we can call it that, about it. How can it be that it is National Defense Information for Mr. Schulte's purposes but not National Defense Information for the New York Times' purposes?

MR. DENTON: So, I think, your Honor, again, this is where we sort of have to unpack the principles.

What the statute requires the government to prove is that the information is related to the national defense in the broad connotation of anything to do with national preparedness, etc., etc., all of those criteria that are set out there. The limiting principles that are adopted like the requirement that the information be closely held do derive from those First Amendment concerns about the statute. And so, in that sense, we are not talking about purely a matter of statutory interpretation -- What does material relating to the national defense mean -- it is a question of interpreting a judicial gloss put on, essentially, to avoid a constitutional problem. And so I think in that sense there may very well be a difference between what is -- what constitutes closely held, what constitutes National Defense Information, again looking purely at those limiting principles for one who is at, sort of, the need here of the First Amendment concerns than it would for

the New York Times where you are talking about the maximum protections of the First Amendment and no other understanding or obligations with respect to materials regarding the national defense.

THE COURT: So to give you a hypothetical, let's say the New York Times publishes exactly what Mr. Schulte is charged with putting in his article, let's say it is a New York Times article. Wikileaks says X and X is highly classified. Mr. Schulte literally just sends the article to his cousin, or brother, or his friend, or whatever. Is that disclosure of National Defense Information because Mr. Schulte is subject to heightened restrictions but the New York Times isn't?

MR. DENTON: Your Honor, you are getting into questions that Department of Justice has studiously avoided answering for a long time because they do implicate some of the broadest reaches of the Espionage Act. I think the answer with respect to Mr. Schulte's re-publication of the information, like in *Wilson*, is yes.

In *Wilson*, this letter from the CIA regarding her service had been published, was widely talked about, was in the Congressional record. She then sought to write about that in her memoir and the Second Circuit's answer was, No, this applies differently to you because you are bound by the secrecy agreement, you don't have the same First Amendment interest. So even if what you purport to be doing is repeating

information that is in the public domain, by virtue of that relationship to the government and the obligations attendant to the handling of classified information, yes.

THE COURT: But *Wilson* is not a criminal prosecution.

MR. DENTON: No, yes. I think the problem, again, is we get back to what is the reason why Courts have put this limiting gloss on National Defense Information? And it is to address First Amendment concerns. In a situation where there is no First Amendment concern, where there is no question that if Mr. Schulte had wanted to write about Vault 7 in a memoir, he was not allowed to do so, is it appropriate to expand the definition of National Defense Information beyond those precise parameters that were part of Judge Crotty's instruction that put the focus on whether the material was lawfully available in a way that reflected the government's intention not to guard it.

THE COURT: Let me press you on what does "lawfully available" mean in the context of *Squillacote* and Judge Crotty's instructions.

It is lawfully available to the New York Times. The New York Times can publish an article about what is on the Wikileaks, it has the First Amendment right to do that. I don't think you are disputing that. So, is that lawfully available?

MR. DENTON: I think the answer is probably not, your

Honor, that the information on Wikileaks was not lawfully available. The fact that the New York Times and others in a certain situation may have a First Amendment right to publish information that is unlawfully available in the same way that they have the right to publish information that's been stolen from a private individual or abstracted through wire taps done without consent, there are any number of circumstances in which they have a First Amendment right to do it but the information, itself, is unlawfully available, it is made available in violation of the law.

THE COURT: Maybe. Maybe not. I mean I guess that's, to me, unlawfully derived, obtained is different than unlawfully available. Right? And to press the hypothetical further, OK, let's say a non-consensual wiretap is leaked to the New York Times and the New York Times has a First Amendment right to publish it. Let's say they actually release the audio of it. Maybe that's not lawfully available to them because it was provided to them in breach of some law but if The Washington Post then publishes an article about the New York Times article, can you actually he say it wasn't lawfully available for The Washington Post? It is in the New York Times.

MR. DENTON: Well, I think, your Honor, that's where we need to get back to sort of why we are and what the defendant wants to do. The defendant is not saying he wrote

about things that were in the New York Times or that he obtained from other lawful sources. He is saying that -- and frankly, I am not even sure that he is saying that I was writing about what was on Wikileaks. What he is saying is that because he was writing about things that were also on Wikileaks -- which in your analogy is the New York Times, the unlawful recipient of the information -- that he therefore should be allowed to introduce classified portions of what remains on Wikileaks in support of that argument.

So whether he could introduce material from the New York Times in support of his argument or something like that I think is a little bit of a different question than whether he gets to go back to the unlawfully available material.

THE COURT: Let me pivot to the second issue that I flagged earlier because it may, to some extent, swallow the hole here which is the willfully, the intent element, that is to say whether, and to what extent, Mr. Schulte's state of mind or subjective intent is relevant to the analysis.

So two separate issues here, one is the two prongs of the statute, the information prong and the documents prong. I think Mr. Schulte is just clearly wrong in saying that he has been charged under the information prong, the S3 indictment is very clear that it is the documents prong. I think that raises some interesting questions. My understanding is that the same charge in the first trial was brought under the information

prong so maybe there are categories of things that the government can charge under either prong, that is to say, where somebody has information in their head but then writes down, memorializes it in a document, that that can be charged under either. I presume it's a question for the jury whether this is a, quote unquote, document. I would also assume that document is given its plain meaning and if it's an actual tangible document it presumably is a document even if the information came from the defendant's head. But to give you a hypothetical here, let's say I had classified information in my head and shared it with you. Presumably, that would have to be charged on the information prong; is that correct?

MR. DENTON: Yes.

THE COURT: Let's say I shared it with you by writing it down and passing it to you. Is it your position, I take it, that that could be charged under either prong?

MR. DENTON: Yes, your Honor.

THE COURT: And that by charging it under the documents prong the government no longer has to prove the intent element of the information prong.

MR. DENTON: Yes, your Honor.

THE COURT: And that's because Congress drafted the law that way and it gives the prosecution the discretion to charge it under either theory; is that correct?

MR. DENTON: Yes, your Honor.

THE COURT: So I will hear from Mr. Schulte on that and maybe that's right.

MR. DENTON: If I may just, your Honor, on the previous charge, it was a little bit of an unusual hybrid in that it was charged as documents, writings, notes, etc., etc., and information, and the charge included the intent element. I think when we heard from the jury the last time, some confusion about how that statute should be applied. When we sought the superseder part of the goal was to eliminate the hybridization and pick a prong and go with it.

THE COURT: And prong, to be clear, has a lower burden for the government?

MS. SHROFF: Exactly.

MR. DENTON: Yes, your Honor.

THE COURT: So that may be proper, it may not be proper, but I will get to that.

The second question is you agree that even on the documents prong, "willfully" is a component of the statute and the government's burden?

MR. DENTON: Yes.

THE COURT: I agree with you that "willfully" doesn't require proof of the defendant's motive and intent; you don't have to slow he had evil motive or bad intent. I will bracket for a moment whether the government's theory introduces that but we will get to that shortly. But even on your theory, I

think to quote from your reply it requires proof that the defendant made a conscious choice to communicate covered information, so that is to say he has to know that it is covered information and made a conscious choice to disclose it, correct?

MR. DENTON: Yes, your Honor.

THE COURT: So I guess the question I have here -- and I am not sure any of the briefing has gotten to the heart of it is -- wouldn't it be a complete defense to the charge if the jury were to find that Mr. Schulte believed, in good faith, that it was not National Defense Information because it was publicly available? Like, we are dealing with some complicated issues that, as you conceded earlier there is not a whole lot of law out there. If Mr. Schulte, who is not a lawyer, was laboring under a good faith belief that this was not National Defense Information because it was publicly available on Wikileaks, putting aside whether that is a correct belief, if it is a good faith belief doesn't that defeat the charge because the jury could not find that he willfully disclosed it?

MR. DENTON: So I think there is a factual question and a legal question, your Honor.

With respect to the factual question, we think that that is not in any way a defense because, as was true at the previous trial, we will introduce the defendant's various secrecy agreements that make clear that public disclosure of

information does not authorize a CIA officer to then discuss it, absent official authorization.

THE COURT: And that is certainly a legitimate argument for to you make to the jury. Let's turn to the legal question.

MR. DENTON: Right.

So I think there is a little bit of imprecision of the language in *Diaz* that talks about the choice to communicate covered information. I think that the willfulness goes to the choice, not the covered information. So, in *Morrison*, this is where the District Court noted that it is irrelevant whether the defendant personally believed that the items related to the national defense and his underlying motive is equally irrelevant. A showing of willfulness only requires that he knew he was doing something that was prohibited by law.

THE COURT: Right. But if he believes in good faith that it is not National Defense Information, how can that be satisfied, that element?

MR. DENTON: Your Honor, I think in that circumstance it is not a question of whether he -- whether he believes it to be National Defense Information or not is a separate question from, again, the purpose that the defense seeks to put here which is show some identity between documents on Wikileaks and documents that he wrote. If the defendant wants to testify *I believed that this was all OK because it was publicly available*

information, bracket the factual question and we dispute that characterization, that doesn't require him to then show document-for-document identity and require disclosure of additional classified information. What is in his head, what's his state of mind is something that he can testify to without further disclosure of the specifics of what is on Wikileaks.

THE COURT: All right.

Mr. Schulte, let me turn to you.

MR. SCHULTE: Yes. What do you want me to pick up on or start, basically?

THE COURT: That's a good question. Let me put this question to you so it is a less abstract and I understand what we are actually litigating here.

This arises in the context of your desire to use classified information at trial, that is to say your Section 5 notice. And I guess maybe what I don't understand and I should have started here is given that the Wikileaks, the leaks themselves are admitted into evidence or will be admitted into evidence as a classified exhibit at trial, can't you make all of the arguments that you are trying to make here, and bracket whether and to what extent they're legally proper -- and that's a separate question. In other words, what evidence besides what is being offered by the government at trial, do you need to make the argument? If the argument was this stuff was all available on Wikileaks, ergo or therefore it was not National

Defense Information, or therefore I didn't believe when I disclosed it that it was National Defense Information, can't you make that argument based on the government's exhibit? What additional classified information would you need to use to make that argument?

MR. SCHULTE: So I think there is two things. One, as I showed the Court, I also intend to introduce these documents, news articles from the Internet that are talking about the same materials but the biggest issue is prejudice, is the fact that you are telling the jury oh, this is classified information, and restricting that information, that really prejudices me because then the jury thinks, well, this is not -- it goes to their minds when they are looking at information, that their view is that this information is all classified, and the government is going through all of these restrictions, that to them it is confusing and prejudicial to me when they're making the decision.

So, the point is that these documents should be displayed just like these other documents from the Internet and it should be showed to the jury that the website that's on the Internet, that they can go to right now, type in a web URL and go to the website just to show that this is on the Internet and publicly available. I think that's the point.

THE COURT: So I understand you correctly, it's not that you want to introduce additional classified information

beyond what the government itself intends to introduce at trial, it is that you just object to the form in which it's presented to the jury?

MR. SCHULTE: Yeah no. The government didn't a -- at the first trial -- this is another issue for the Court. But what the government did, especially for their first witness, Rosenzweig, whatever, is that they went through and picked out whatever documents from Wikileaks and they declassified those documents and they gave it to him and he put it in his slide show to go through those specific documents. So those were the only Wikileaks disclosures that were made and publicly produced as exhibits to the jury.

THE COURT: But the Wikileaks leaks themselves were in evidence as a classified exhibit. Am I wrong about that?

Mr. Denton, is that correct?

MR. DENTON: Yes, your Honor. It was Government Exhibit 1.

MR. SCHULTE: I think it was on a laptop or something, right?

THE COURT: So I guess the question I have is that given that they're in evidence, putting aside whether that -- I mean, there are two separate questions here is my point. One is if the information is in evidence, you can make the argument that you want to make, that *Look, Jury, this stuff is actually, was available online, look at Government Exhibit 1, ergo it*

wasn't National Defense Information or I didn't believe it was National Defense Information and therefore didn't willfully do anything. It seems to me that you can make that argument based on what the government itself plans to introduce at trial and nothing additional that you would need to make that argument. That is a separate argument from there is some prejudice to you from presenting it to the jury as a classified exhibit.

MR. SCHULTE: I think the big issue is the way the material was produced to the jury was they put it all on a laptop and said they could go look at it at some point, it wasn't actually shown to the jury. So what I do is pick out in my CIPA 5s all of the stuff relevant to the charges against me and I want to pick out certain pages to display to the jury as an exhibit. I don't want to just put it all on a laptop and say go look at it sometime. I want to bring these points out specifically and point them out to the jury as exhibits. That is why I brought up the Rosenzweig expert. So, he picked out certain exhibits he wanted to show to the jury, the government de-classified them for his disclosure to the jury. I want the same opportunity. I want to pick out the documents the government is alleging that is the basis behind the MCC charges. I just want to exhibit those and show those to the jury instead of --

The big point my standby counsel makes to me is the government is entitled to present the case they want to present

and they're basically imposing stipulations onto my case where I am entitled to present my case, and my case is if you go to the Wikileaks website, there is no notices like the government would put up on foreign sites, there is no explicit warnings, there is nothing saying -- you know, there is nothing that the government did to try and take down the site or anything like that. You can go to the site and you can look up and you can find the specific documents here that I want to exhibit. I want to show the jury this information and this is part of my, the defense -- the main part of my defense I want to raise for these charges. So being able to actually present them as unclassified exhibits, just like the government did, I think I am entitled to present my case just like they're entitled to present their case. And the fact that they're able to de-classify things at will shouldn't prejudice me. If I need documents in the same format the government has provided why can I not have these exhibits unclassified before the jury and have them review it in this manner?

THE COURT: That's what this process is for, right, Section 5 notice is for you to notify, with specificity, what it is you want to use and what you want to use it for. So, that's the whole point of this exercise.

MR. SCHULTE: Right.

THE COURT: And I guess I don't quite understand which of these documents you are seeking to use and how that you

couldn't use what's already in evidence without compromising classified information to make the same argument.

MR. SCHULTE: The two things is that what was in evidence is it was just a laptop. So the government put the material on a laptop and gave it to the jury to review. The way I want to present my case is I want to go through each of these documents, present them to the jury, and have the jury review them as exhibits, not just giving the jury a laptop and say go look at this at your leisure.

I also want to show the jury how easy it is to access this information as well, you know, that they can go to the sites, they can pull this information up. It is just on the Internet. That's the whole crux of my case, is that this information is on the Internet so being able to show to the jury *If you type this URL in, here is the site, and here is the specific information.*

The second part, too, is that the de-classification of this information is very minor -- this stuff is already on the Internet and the three points or the three things that I am raising, this material, there is very little prejudice to the government at all in de-classifying this information for the jury. And, like I said, the government has been able to go through and de-classify the things that it wants to show to the jury. That's all I'm asking, is to be able to have the same opportunity to show the jury the exhibits, not to have a

classified laptop and have them all look at this -- I want to show, pull up the exhibits. I want to be able to go to the website. I want them to go to the website to pull it up to show this is accessible on the Internet and how easy it is to access. That's the point.

The other issue that I was raising is in addition to the fact that the information is not closely held we haven't really talked about, but there is no prejudice at all to the government.

The second prong is the fact that this information is not harmful to the national defense anymore. These networks, all of this information, the day Wikileaks information came out, the government shut it down. The DevLAN was shut down. All of this information was shut down. So there is no prejudice at all talking about networks that no longer exist anymore or this information that is not even used anymore which is something else that I intend to show to the jury, that this information is not -- why this information is not NDI. It is not because it is public all over the Internet, it is also because the government shut it down 18 months before the government alleges that I introduced this information from MCC.

THE COURT: Mr. Denton?

MR. DENTON: Your Honor, I think sort of you put your finger on the crux of it which is that to the extent that the defendant's argument is about his state of mind, first of all,

that is obviously something he would have to testify about. Secondly, I think, again, there is going to be a laptop in evidence that has this material. To the extent that the defendant wants to point to material that the jury should pay attention to, he has the ability to do that. His assumptions about what is still sensitive or not sensitive may be relevant to his state of mind but they're not relevant to whether the information should be introduced at trial. And again, to the extent that there is a question about the sensitivity of it there is a part of Section 6, 6(c), that would allow the government to make that proffer. I don't think that is relevant here. Again, it is going into evidence as a classified exhibit. Section 8 of CIPA specifically authorized that exhibits can be received without changing classification status. We litigated whether this was an appropriate course. I think here it is, and the defendant's desire to disclose more in a circumstance where, again, it is not really relevant because, as a factual question whether it is there or not is not relevant to whether he thought it was, whether he had a good faith belief it was or not which, again, is something that he would have to testify to and he can testify to. So I think that's really what it comes down to, your Honor.

THE COURT: And the harm to the government point that Mr. Schulte made?

MR. DENTON: So, first of all, your Honor, there is

still significant harm that comes from acknowledgment. [redacted]

[redacted]

Second, [redacted]

[redacted]

THE COURT: And putting aside whether he would have to testify for it to come in or be relevant, talk to me about the admissibility or use of these articles that Mr. Schulte has handed up from the New York Times and other publications. Presumably he could take the stand and offer these and say, you know, I believe that what I put in those articles was already part of the public domain including in these articles and therefore didn't have the willfulness required to commit this crime.

Is that correct?

MR. DENTON: I think that's right with the caveat obviously, your Honor, the articles would not be themselves offered for the truth and it would be important for the Court to instruct the jury on their limited purpose. It is a little unusual to have newspaper articles coming in but, again, if the defendant wants to put them at issue by saying that these things affected my state of mind then, again, there is an appropriate limiting instruction the Court can give the jury for that purpose.

THE COURT: OK. And what about the Wikileaks website?

MR. DENTON: Again, your Honor, the Wikileaks website is classified. The fact that it is available does not mean that it is not classified information. A lot of the information on there is marked as classified. And so, again, I think there may be parts of the Wikileaks website at large -- and, again, there are some errors in what the defendant represented about what Mr. Rosenzweig testified to -- but it is the case that certain pages were declassified at the last trial. Again, I think that to the extent that the defendant wants to start pulling up the Wikileaks website, that's a different story. I think to the extent the Court thinks it is relevant that Vault 7 appears on the Wikileaks on the Internet and is still there, that's something that can probably get addressed by a stipulation under Section 6(c). The defendant doesn't have the choice to reject a stipulation under CIPA. To

the extent he wants to disclose classified information, his right is only to something that gives him the same substantial ability to make his defense, not the precise way he wants to make it. If we have to, for some reason, enter into a stipulation or frankly even have one of the witnesses testify that Vault 7 is still on the Internet, I think that's something we can do without getting into the specifics of additional parts of it that remain classified.

THE COURT: Well, to be clear, whether it is still on the Internet today is not relevant to any of the issues in this trial as far as I can tell, but whether it was on the Internet at the time of the MCC leaks may well be, or at least I think that's what Mr. Schulte wants to argue and I would think that to the extent that it is a jury question whether it is NDI and it is a jury question whether he had the necessary willfulness, my intuition at the moment -- I'm going to think about this stuff and not issue any ruling on this score today -- is that he needs to have the ability to make those arguments to the jury in some fashion or form. Now, maybe that's already the case because Government Exhibit 1 will be in evidence and he can point to it. It may be a stipulation or some variation you are describing would be another necessary piece. I don't know.

But, that's what I am grappling with here.

MR. DENTON: Understood, your Honor.

Again, the last time we had an agent testify about

Government Exhibit 1, about how he downloaded from the Internet on a particular series of days and that that was the material that was stored there. To the extent that it is necessary to confirm that as of October 2018, the sort of end of the time period for the MCC counts, it was still there, that is something we can have somebody testify to or stipulate to or find some other way to satisfy that.

THE COURT: OK.

Mr. Schulte, why would that not suffice and what particular portions of the website or document would you need to point to to make the argument that you want to make that you couldn't make on the basis of Government Exhibit 1 which will presumably be in evidence at this trial as well?

MR. SCHULTE: The first thing I want to bring up is that this is the whole point of CIPA. Why, during the first trial, did the government say [redacted]. The point of this is for me to identify the information that is relevant to my defense. I mean, that's the whole point of CIPA. So the fact that the government is saying, well, this is classified so we will keep it classified and shut down the trial and can't get a public trial for the three or four days of the MCC charge, is just absurd. That's the whole point of this.

The other thing is the introduction of the Exhibit 1 to the jury is simply to show the jury the information. The government is alleging that this is National Defense Information. There was no specific argument for any specific document there. The introduction of that evidence was simply here is all of the Wikileaks disclosures, you can browse through and look at it and determine basically if this is NDI or not.

THE COURT: But my question is -- and I am inclined to agree with Mr. Denton -- that unless you take the stand I am not sure how this argument is even made but -- well, there is the objective, *This isn't National Defense Information because it was publicly available*, I'm not sure you need to take the stand to make that argument if that is a proper argument and I'm going to think about that, versus the *I believed in good faith that this wasn't National Defense Information*. I think there is no way to make that, to inject that argument in the trial unless you take the stand.

The question that I am trying to put to you and I want a specific answer is whichever of those arguments you make, whether you testify or you don't testify, why can't you make that argument on the basis of what will be in evidence, namely the leak itself and classified Exhibit 1? In other words, you can point to that and say, look, ladies and gentlemen of the jury, all the information in the documents that I'm accused of

leaking from the MCC, all of that information was on the Internet, you can see it for yourself in Government Exhibit 1 and you have heard either the stipulation or the witness, as the case may be, that on the date that I am charged with leaking this from the MCC, that all of it was still there on that date so this is not National Defense Information because it was free and available to everyone who typed in the URL and went to the website. In other words, you can make that argument already. What additional disclosure do you need to make that argument?

MR. SCHULTE: The first thing is we need access to the Internet to show, to type the URL in, to go to the website to show that this is on the Internet. But the bigger thing, the bigger issue is I want to specifically go through these documents and show the very specific statement that the government says I made that are NDI. I don't want to simply -- I mean, this is the crux of my defense. It basically would be neutering my whole defense if I am just saying, *Look at this, this is not NDI, take a look at Government Exhibit 1.* I have a right for the complete defense to show each of the pages and show to the jury, OK, if you read this from exhibit whatever, look what Wikileaks says, it says -- and then show statements the government says that I -- allege that I made. It is the exact same. This is the exact same wording. And then, go to the next one, here it is again, it is the exact same wording.

And then go back and show, OK, this is on the Internet. The government didn't put up any -- there is no special warnings or anything about this. You can go to this URL and you can see the exact same phrasing here and compare it. I want to put up multiple exhibits and then compare it with what the government says that I said and to show that it's all the same.

So this is not simply, oh, just go take a look at GX- 1. I want to spend considerable time going through each of these specific documents and showing the exact words that were said on Wikileaks, the exact words the government says I said, and compare them.

The other issue, the other big issue comes back to the prejudice. The GX- 1 was admitted into evidence. The FBI testified I had to go to a special place, I had to download this on this computer, keep it secure, this is classified, this is very highly classified information from the CIA. So, by doing all of that, it significantly prejudices me in actually putting up exhibits where the jury is not notified on anything like that, it is just GX- whatever. We are not saying this is, you know, super sensitive or anything like that. I should be able to show, for the jury: Here is the exhibit, this is from the website, this is from the URL, these are the exact words, and not be prejudiced by either shutting down the whole trial to present classified exhibits or otherwise just telling them to reference the classified GX- 1 laptop.

So, just as they can call an FBI agent, I would want to call a paralegal to basically testify and show that he went to this website, show how he typed the URL in, how he went to a certain page and to display the information there before the jury. And, again, I want to make clear that the government has already essentially done this. Why couldn't they, for Rosenzweig, when he testified, why couldn't they say look at GX- 1. No. What they did is they specifically went through the pages, they showed to the jury -- they declassified them and showed them to the jury. So the government has done this and it has done this to benefit itself and is basically saying I don't have the same opportunity to do the same thing that they have already done and, instead, either shut down the whole trial or let's just reference this classified laptop and tell the jury to look through this. You know, it just neuters my defense completely, I'm not able to make the same defense that I would otherwise be able to make, this was classified or at least whatever redactions.

THE COURT: Mr. Denton, let me turn back to you.

Number one, could Mr. Schulte call a witness, whether a paralegal or someone, to testify that they went on a regular computer and typed in this URL and this is what popped up?

MR. DENTON: No, your Honor. [redacted]. The Court would have to authorize its disclosure under Sections 5 and 6.

THE COURT: OK.

And the second question, to the extent that Mr. Schulte wants to point to these particular, let's call them extracts from the Wikileaks disclosures, is not one answer here to admit these as Government's Exhibits 1A, 1B, 1C, 1D, have the documents themselves basically just separated from their source, and Mr. Schulte can then more easily direct the jury's attention to them and make whatever arguments he wants to make?

MR. DENTON: Yes, your Honor -- or defense exhibits if he wants to denominate them as such.

MR. SCHULTE: But they would close the courtroom down; is that right? It wouldn't be a public trial anymore if that's what you are still referring to them as classified exhibits, right?

THE COURT: Mr. Denton?

MR. DENTON: Yes, your Honor. In a sense there is a limited courtroom closure for the introduction of classified exhibits. That was all briefed with the introduction of Government Exhibit 1. There isn't a lot of experience in this district with it. My understanding is that, in particular in the Eastern District of Virginia where this has happened a number of times, Courts have sort of worked around it where juries have been shown exhibits and the testimony sort of points to the exhibit without getting into its content in any detail. I think if there the sort of finer points of the

limited closure are what's at issue, I think that's something we can certainly work through. Again, to the extent the goal is for the defendant to point to particular parts of Government Exhibit 1, I think your Honor's solution is a particularly fine one and we can identify those, as such. I would note, purely as an administrative matter, the defendant identifies a lot of duplicative pages as potential exhibits. I don't know whether we would need to do all of that way but if they're staying in classified form and they are all coming into evidence anyway, I think we can do basically whatever he feels he wants as far as that list goes.

THE COURT: Mr. Schulte, why doesn't that provide you what you need to make the argument you want to make to the jury? Let's bracket, for the moment, the public trial question because that is a separate question. The question here is whether you can make the arguments you want to make as part of your defense.

MR. SCHULTE: The point is I lose, basically, the ease of being able to show them without the burden of saying, oh, here is this information classified, this information is protected, and the ease with which they can access it such as -- so, you know, they are saying that I can't have a paralegal testify and actually go to the website in front of the jury without either closing it or without saying, oh, this is classified. So, that's the issue. The issue is I want to

be able to present my case and to show this and to be able to show the jury the ease of which they can access this material, the ease with which they could have accessed the material. The whole point is this is not NDI so I don't want the jury to be prejudiced, with the caveat, oh, this is classified information, this is very protected, you can't disclose this to anyone. Because then if I am making the argument that this is NDI, it goes against -- the jury's is already prejudiced against me saying the government, we had to do all of these restrictive measures and they couldn't even go to the website on the Internet, they can't even it is so restricted.

The point is I can't make the same defense I otherwise could make by simply exhibiting things, just as the government has done with its own, because of the restrictions and prejudice to the jury about how this information is displayed and how they accessed this information easily through the Internet.

There is a reason that demonstratives are used, to be able to easily explain to the jury, the government is simply stopping me from doing that. I want to have -- I want to show a demonstrative of how easily this information is accessible. I don't want -- and that the government didn't take any steps on taking this site down or anything and basically showing this information without the weight of the prejudice behind the classified nature or whatever other things would accompany

having them be classified exhibits.

I also note for the Court that in the previous trial before Judge Crotty, there was nothing else that was ever introduced as classified exhibits. We went through binders and binders of information and the whole point was to de-classify it for the jury. The only thing that was agreed to have a classified exhibit was simply information that both parties were not going to reference specifically but which the government just wanted to show generically the entire -- the documents for the jury to basically browse at its leisure. This is completely different. What I am proposing is essentially what we did to the other documents before Judge Crotty. There was never any other introduction, there was never any other classified exhibits at all through the trial.

THE COURT: All right. Last question for Mr. Denton on this front and then I want to move on since I think we have probably plowed this ground.

The question I have for you is you suggested that maybe under 6(c) there is a stipulation that would suffice here and I guess my question is what would that stipulation say that wouldn't be a form of the testimony that you just said would be impermissible, namely, that somebody could just simply go on the Internet and type in a URL and up would pop this document.

MR. DENTON: So I think, your Honor, the issue comes from sort of the public display. I think that if the issue is

just confirming that a particular page remains available on the Internet without either a witness or the government displaying it and giving it imprimatur and otherwise putting it up in a public proceeding, I think that's fine. I question whether there is any relevance as to what your Honor earlier noted as opposed to what was available now as opposed to what was available in October of 2018 but I think, again, there might be some stipulation that doesn't involve the actual disclosure of the classified information that simply says this is still on Wikileaks.

THE COURT: But would it be something in the nature of between March of 2017 and -- well, whatever date -- and October of 2018, Government Exhibit 1 was available on the Internet?

MR. DENTON: Yes. I think that would work, your Honor. We might have to modify it to reflect that the leaks came out in dribs and drabs but we can figure out the details on that. In concept, I think that would work.

THE COURT: I would think about that because I think, at a minimum, that is certainly -- I think Mr. Schulte is entitled to that to make some of the arguments that he wishes to make here. I am also inclined to think that, at a minimum, admitting these documents as essentially pullouts from Government Exhibit 1 so that they're more easily identifiable to the jury is also fair game, but I will ponder the rest of this and we will revisit it, as needed, and I will issue

rulings, as needed, or we will take it as it comes.

I think that covers a lot of this. One other component of the Section 5 notice was, essentially, the relevance of sort of other CIA operations information, essentially that, for lack of a better way of describing it, the argument that Mr. Schulte had more damaging National Defense Information at his disposal and if he really wanted to harm the United States he could have revealed or would have revealed that than what he allegedly did reveal. I guess I am inclined to think here that but for one significant thing that I will get to in a moment, that the government is right that his motives are not relevant and the fact that he could have inflicted more damage is not necessarily relevant. But, the one significant caveat to that is to the extent the government intends to introduce Mr. Schulte's statement that he wanted to or was engaged in a, quote unquote, information war with the United States, does that not open the door to this sort of argument? That is to say, yes, the government doesn't have to prove ill will or evil motive, but if part of the government's theory of the case is that Mr. Schulte was in fact engaging in a, quote unquote, information war, is it not fair game for Mr. Schulte to come back and say that makes no sense because I had all these other more significant weapons at my disposal and if I was engaged in a war with the United States, it makes no sense that I would have done this and not used these weapons.

So that's my question to you, Mr. Denton.

MR. DENTON: So I think two things, your Honor.

First of all, that very much does require the defendant to testify. The second thing is I think the defendant indicated that he intended to testify about the specifics of that information. I think there is a difference between what your Honor characterized, which is an argument or testimony that why would anyone think this was an information war, this was so innocuous. That is very different from saying, *and you know it's innocuous because here is the* [redacted]

THE COURT: I want to be clear, he is not going do that. And I don't know if he is suggesting that that's what he plans to do but that, to me, is definitely not even close to the line.

But I guess the question to me is is that a legitimate argument. And then we can talk about what he would need to make that argument and maybe it is not more than either a stipulation or generalized testimony that he was privy to various information at the CIA regarding [redacted] regarding this and that that were highly classified, potentially deeply damaging to the United States, and there is no allegation that he disclosed any of that, without getting into the particulars.

MR. DENTON: Again, I think something along those

lines might be possible, your Honor. I think it is just, there, it really is the devil is in the details. So we are responding to what the defendant put in his Section 5 notice which included [redacted] and a laundry list of things that we don't think was sufficiently specifically and so didn't meet the requirements of Section 5. I think if he wants to, if the Court is inclined to give him permission to give him a more specific notice of what he intends to say, then we can address that and there may be a stipulation but the devil is very much in the details on where there would be sensitivity there.

THE COURT: Do you agree that at that level of generality the argument that he is engaged in information war sort of opens the door to at least some rebuttal of that sort?

MR. DENTON: I'm not sure that it does, your Honor, because the defendant's characterization of his own statements I don't think requires evidence of other things that were -- could have been in his mind. Again, to the extent that the defendant wants to testify, *That's not what I meant*, that's very different from saying, *And I could have meant something else*. The hypothetical is not relevant to his testimony that 7this is not what I meant when I said that.

He has a theory that the information war was about his petitioning of grievances with respect to the justice system. If he wants to say, *That's what I meant about that*, that's totally fair game. But to say, *I could have meant something*

else and I would have done it this way, I think is a hypothetical that's not relevant to the question of what his state of mind actually was.

THE COURT: All right.

Mr. Schulte?

MR. SCHULTE: The government is mischaracterizing information, that's the problem, is that as defined in the notebooks, yes, I say "information war," I defined it specifically to be unclassified redress of grievances. What the government is arguing, as they did in the first trial, oh, he declared information war so he could release classified information. So, by the government saying that, the Court is right, that is what opens the door, is by the government saying that I intended to release classified information, that is what then opens the door to say, well, this doesn't even make sense because the things that the government says are classified and how they're produced in these documents, you know, two sentences on page 84 out of a 160-page document, how is that intent? How is that showing that I am trying to release classified information when, in reality, I know all this information.

And the Court is also right where I specifically say that this information, I state it in generic terms, and so it doesn't make sense when the government is saying, well, he needs to be more specific so that we can determine if it is

relevant. But the whole point is I am putting it in generic terms so that it is unclassified to be used so it doesn't make sense for the government to say I have to be specific so that I can be generic when I am purposefully being generic about the information I know to keep it unclassified so we can continue to protect it from disclosure.

So by saying that I had -- that I know [redacted] particular -- I know [redacted] that could cause harm to the U.S. or [redacted] that I worked on, you know, this type of information. And that's why I stated generically in the CIPA 5 that there is no -- I'm not trying to say anything specific. And I even say in the CIPA 6 that, you know, the point of it is not to divulge specific information regarding CIA sources and methods. The point is generic, unclassified testimony.

THE COURT: I do think the devil is in the details.

To be clear, in your Section 5 notice you say, I intend to testify about all this highly classified information including the [redacted] in [redacted]

MR. SCHULTE: Correct.

THE COURT: Just to be clear, you are not proposing or suggesting that you would divulge [redacted]

MR. SCHULTE: No. That's right. The information there is literally what I am going to be testifying. I'm not

saying that these are the [redacted] I'm not going to be testifying, *Here is the* [redacted] and cause damage. I'm saying I know that --

THE COURT: In other words, you would testify essentially as you just state here, that I was privy to the [redacted] --

MR. SCHULTE: Correct.

THE COURT: -- [redacted] and had I intended to cause damage in the United States and engaged in a war I could have disclosed that but I didn't.

MR. SCHULTE: Correct.

THE COURT: So, Mr. Denton, maybe that clarifies it. If the level of generality or detail, as the case may be, is literally what is here, just that Mr. Schulte does propose to testify and say he was privy to this kind of information without disclosing the particulars of any of the information, problem? Not a problem?

MR. DENTON: I think two things, your Honor.

First, the problem for Mr. Schulte is, again, where does this come in as a matter of relevance? I think it is seriously freighting the government's use of "information war" to say he gets to introduce a whole bunch of information that is, as a matter of law, not relevant to an element of the offense. So I think to the extent that that's what we are bearing it on, again, we are far afield from the defendant's

own version of what "information war" meant.

THE COURT: But let me ask you to assume for the sake of argument that I disagree with you and that by introducing the concept of Mr. Schulte being engaged in an information war, you are opening the door to him saying information war? That makes no sense. I was privy to all of this more damaging information and there is no allegation that I have disclosed that. So let's assume that I disagree with you on that.

MR. DENTON: So I think, your Honor, in that instance, again, we would have to have a pretty serious discussion. I think even this level of generality is, A, more than would be -- is something that we could tolerate, I think again talking about the [redacted] particularly when you associate that with the type of work that Mr. Schulte did and the testimony about the types of tools that he worked on gets problematic.

Also, to the extent the defendant is purporting to testify about [redacted] I think we may have a candor question. We need to figure out whether what he is proffering is something he actually knew or is true. There are representations he makes in his notebooks that are false about operations that were conducted or that he worked on.

THE COURT: I mean that --

MR. DENTON: I would say, your Honor, I think at that

point what would probably fit the bill is a statement that, you know, Mr. Schulte, as a result of his work at the CIA, was privy to additional, highly-sensitive classified information that was not recorded in Government's Exhibits 801, 806, and 809.

THE COURT: Mr. Schulte?

MR. SCHULTE: So Mr. Denton is basically saying I don't get to try my case at all, it is all by stipulation for the government. It is just -- it is absurd, especially the government is saying, well, the statements that I am making are not true. I mean, I don't know what they're trying to do. If they're going to bring it out on cross-examination then they're bringing out the detail. That doesn't really make any sense so I am not really clear what he is trying to say about that.

But, the big issue that we come back to is they're trying to say, oh, his information war -- the point is if the government is trying to say the information war is something other than what was actually defined in the notebooks which it specifically states this redress of grievances, so the government is trying to say that it is to release classified information then I should be able to testify that this is absurd because here is actual, true National Defense Information that I know about that were never released, intended to release, even discussed in the notebooks.

THE COURT: Well, I think in answer to the first

point, that's what 6(c) is about. To the extent that I think it is relevant and admissible, it may be that it is admissible but in a form that we wouldn't necessarily want it to be admitted in at a normal trial because it involves classified information. So that is what this exercise is about.

I am inclined -- again, I'm going to reserve judgment here too so I can think a bit more about it, I am inclined to think that by introducing the concept of an information war and making the argument that that was part of the defendant's motive here, that the government does open the door to testimony of this nature, then I think the question is a 6(c) one, what does the testimony entail or look like and at what level of generality is it summarized but we are not at the 6(c) stage just yet.

Yes, Mr. Denton?

MR. DENTON: Your Honor, I think there is an issue here that I'm not really following where the factual introduction of the defendant's statement about the information war and the law are going to coincide. The defendant has put his intent at issue. He is claiming he did not intend to disclose classified information. That does not require the government to prove or him to disprove that he had any intent to harm the United States. And so, again, the question of what "information war" means in the context of the defendant having written it down, it's words that he said, it's not a statement

one way or the other, and his intent remains not an element of the offense either way. And so, I sort of fail to see how the introduction of his own statement and testimony from another witness who will testify about his use of the statement in context of the notebooks does anything other than, again, the basic legal point of putting his intent at issue and intent to harm is not the relevant intent.

THE COURT: All right. I understand, and to the extent that is an argument under 6(a), I will take it under advisement. If I disagree with you then we are in 6(c) land and will discuss what form it will take. And you may be on firm ground in arguing the level of detail disclosed here is problematic and also not necessary for him to make the argument that he wants to make but we are not there yet. So, I will reserve judgment and we will circle back to it.

Let's take a five-minute break and we will pick up from there. See you in five minutes.

(Recess).

MS. SHROFF: Your Honor, I'm sorry. Before the Court starts, may I tell the Court I checked about the [redacted],

[redacted]

[redacted]

THE COURT: Great. Thank you.

On the theory that you guys might not have electronic devices available to you, I will let you know that the Second Circuit affirmed the denial of bail on my ruling in December. So just so you know.

The only remaining things that I have to cover -- we are almost near the end, I think -- are number one, the [redacted] issue; number two, the audio-video recordings; number three, the Michael memo that Mr. Schulte raised today; and number four, the forensic crime scene. I think that's all that I have on my remaining agenda. When I say that's all I'm not sure it will be so quick but, nevertheless, I think we have covered the big picture items.

On the [redacted] front, Mr. Schulte, let me start with you.

[redacted]

[redacted]

THE COURT: So, Mr. Schulte, I am inclined to agree with the government that you have not disclosed with the requisite specificity what you propose to testify to [redacted] so in that sense I disagree that I don't think the ball is, quote unquote, in the government's court, I think it is firmly in yours under Section 5 and you haven't satisfied the particularity requirement of that section.

So, if you want to elaborate and explain?

MR. SCHULTE: Yes.

So this comes back to the same issue before about my testimony. This is just generic. [redacted]

[redacted]

THE COURT: And the purpose --

MR. SCHULTE: So the government is saying that I'm not specific enough, that's the point, is I'm trying to be generic to keep it unclassified. I'm not trying to say, oh, [redacted] I am trying to keep it generic to keep it

unclassified [redacted].

THE COURT: OK. And the purpose of that testimony is what?

MR. SCHULTE: It is the same -- it is just the same, [redacted]

THE COURT: OK, but I think the devil is in the details again and I think [redacted] is cause for concern. Can you elaborate on what you propose to --

MR. SCHULTE: Yes. [redacted]

[redacted]

So, again, I think the question is how does the testimony match up with the admissible purpose [redacted]

THE COURT: Mr. Schulte?

MR. SCHULTE: Yes. So, I'm sorry, is Mr. Denton saying [redacted]?

THE COURT: I don't know. I guess the question is -- and, unfortunately, I don't think I have your original Section 5 notices here [redacted].

MR. DENTON: I think again, your Honor, that ended up

getting worked out. [redacted]

[redacted] [redacted] Again, I think we can carve this down to what is the point, and the point is that the defendant can testify about things within his personal knowledge relevant to an issue in the case.

THE COURT: Ms. Shroff, it is very hard to tell when you are speaking to Mr. Schulte whether it is something on the record to me or not and I would ask you just to refrain from commenting, particularly when somebody else is speaking.

Mr. Schulte, can you respond to that and clarify what exactly you are seeking to offer here? I mean, to the extent you are simply proposing to [redacted]

[redacted] To the extent that you are proposing to go beyond that, then I think we need to adjudicate whether that is proper.

MR. SCHULTE: Right.

[redacted]

So all I was trying to do here was to make sure that the government understands that this is part of that testimony.

[redacted]

[redacted]

[redacted]

THE COURT: And if Mr. Schulte were to testify literally verbatim as to what is in his notice here, that he relied on -- or that [redacted] -- I don't even know what number two means -- if he were to testify just to this but not to any of the particulars, OK? Not OK?

MR. DENTON: I think then we have a 403 question which is what does this have to do with anything.

THE COURT: That is a good question.

Mr. Schulte, what does this have to do with anything?

MR. SCHULTE: Yeah, I mean, I think the government objected to [redacted]

THE COURT: Well, that's not the question I am asking you. What is the relevance of what you are proposing to testify to here. [redacted] Mr. Denton takes no issue with you testifying about that, but why do you need to go beyond that to offer any testimony or evidence concerning [redacted]

MR. SCHULTE: [redacted]

[redacted]

[redacted] and also, as standby counsel just noted, that I am essentially being forced to, you know, give the whole -- my whole testimony to the government which, you know, is problematic in and of itself but, essentially, the whole testimony regarding [redacted]

[redacted]

THE COURT: Mr. Denton?

MR. DENTON: Your Honor, there is a level of commentary there that is new going back to even the last Section 6 proceeding. First of all, I don't know if I am misinterpreting what Mr. Schulte said or what, but Mr. Schulte [redacted] That is a lie.

To the extent that he wants to assert that he had some involvement in [redacted] that is also false. I think what we are prepared to do is reach a reasonable agreement about what he can say about his personal involvement in things that was an explanation for this conduct. If the defendant wants to lie about it, then we are just not going to be able to reach a stipulation. We are not going to agree to facts that are false. So we are getting a little further afield than I thought we had ever been on this subject.

MR. SCHULTE: Yes, so that's -- as an initial matter, I have been involved in actually discussing [redacted] but that's not what I was saying here at all. [redacted]

[redacted]

[redacted] So that's what the testimony would be.

THE COURT: OK. I'm not quite sure what to do with this. [redacted]

[redacted]

MR. DENTON: [redacted]

[redacted]

THE COURT: Why don't you do that -- can you do it by the end of this week?

MR. DENTON: Definitely, your Honor.

MS. SHROFF: Your Honor, we ask that the government provide us with a copy of whatever it gives to the Court to Mr. Schulte too.

I wanted to point out that the trial strategy at the first trial is not necessarily the trial strategy at the second trial. It could very well be that his defense team had decided that he wasn't going to testify at the first trial. So, the arguments that Mr. Schulte makes now should not necessarily be precluded because we didn't make them in the first trial because we may have made different judgment calls at the first trial.

And I just remind Mr. Schulte, and noting the Court's admonition to not speak at the same time as the other proceedings are going on which is hard as standby counsel, I just wanted to note that he is not required to preview his entire testimony here for the government to then shape their own case-in-chief and how they're going to cross-examine him. I don't think CIPA requires that of Mr. Schulte and I think Mr. Schulte may want to object on that ground.

THE COURT: First of all, Mr. Schulte is representing himself, you are not representing him, so in that regard I will hear from him but not from you.

Number two, I don't object to you communicating with Mr. Schulte. I object to you communicating with him in an audible fashion that makes it difficult for the court reporter and me to know when you are speaking in a way that we are intending to hear and listen to and respond to versus just speaking to him.

So I'm not preventing from communicating --

MS. SHROFF: No, no. I didn't mean to imply that.

THE COURT: Number three, I think Section 5 does in fact require Mr. Schulte to disclose to the government and to me what, if any, classified information he intends to use as part of his case, whether it is through his testimony or otherwise, so that we can litigate whether he is permitted to do so and, if so, whether there is a substitute or redaction or whatever the case may be. This is not normal litigation and you have been down this road before, you understand how this works but I think you are just flat wrong about that.

MS. SHROFF: Your Honor, in the last trial we asked for the Section 5 notice about his testimony to be given just to Judge Crotty and we asked Judge Crotty to hold off on such a hearing after the government ended its case.

THE COURT: Well, no such request has been made to me so I have not been presented with that.

In any event, Mr. Schulte said that what he proposes to do is [redacted]

[redacted] and that requires me to look at the documents that the government will submit to me by the end of the week and of course they will provide a copy to Mr. Schulte.

Now I will turn to the next item which was the recordings and here I am just not quite sure I understand what the issue is. So, Mr. Denton, let me start with you. Maybe you can elaborate or explain what we are talking about here.

MR. DENTON: Sure, your Honor.

So in answer of the defendant's arrest as part of the investigation, a number of individuals who were working in essence as confidential sources for law enforcement -- they were penal known to the defendant -- had communications with him that were recorded and provided. There is 70-some-odd of them. All but nine of them are either unclassified or declassified and are available to the defendant in unclassified discovery. There are nine that include classified information which remain classified and were not the subject of a Section 5 notice so we were a little surprised to see that in the defendant's response as well.

Again, to the extent that the defendant wants to use them, give us notice on what, we can have a discussion about how or whether they can be redacted in an appropriate way for use at trial. Again, to the extent the defendant is seeking to offer his own statements for their truth, there would be an

admissible problem separate from the CIPA problem but I think, again, we are just a little bit at odds on what we are supposed to be doing about the recordings.

THE COURT: Mr. Schulte, I didn't see this anywhere in your Section 5 notice so was a little puzzled myself. So, can you explain?

MR. SCHULTE: Both this issue and the micro issue --

THE COURT: Let's take them one at a time so start with the recordings.

MR. SCHULTE: Right.

So, the CIPA 5 I submitted was supplemental and I basically said I renew the same objections or discussions on the previous CIPA 5, so my intent today in coming to the hearing was specifically to talk about these two issues so I didn't think I had to give a new CIPA 5 notice on the same issues that were noticed before. If that was not correct then I am mistaken. I am mistaken on that.

THE COURT: So these recordings were in your Section 5 notice before the first trial?

MR. SCHULTE: Yes. We moved to de-classify this information for the first trial was my recollection.

THE COURT: So I read Judge Crotty's rulings on the CIPA Section 5 and 6 issues and I don't recall seeing anything about the recordings.

MR. DENTON: Your Honor, there were two separate

issues. They were not part of the CIPA proceedings. The defendant objected to the classification of the recordings and moved for an order requiring the government to declassify them because he felt they were unclassified. Judge Crotty rejected that and, again, we noted that there were only nine of them that had that and the Court held that he would not compel declassification.

That's as far as it went.

THE COURT: Were those recordings identified in his Section 5 notice before the first trial?

MR. DENTON: I don't believe they were, your Honor.

THE COURT: OK.

Mr. Schulte?

MR. SCHULTE: So, the point to declassify the recordings was for use at trial, so my recollection is this was included in the CIPA proceeding. But, even if it wasn't, we moved to declassify it for use at trial so it should have been basically -- it should have been pursuant to the same CIPA. The whole point of the CIPA is for declassification for use at trial or substitution so we moved -- or the Judge had separate orders regarding that, is my recollection, and maybe I am mistaken about that, but I thought that was all with the same, with the CIPA 6 proceeding before. If it wasn't, it is still the motion to remove the classified or declassify it would still be technically a CIPA motion or related to CIPA so I

think it is still relevant for discussion here.

I think the big issue regarding these nine documents or these nine recordings is we never really received explanations or testimony for what specifically was classified or why it was classified and that's basically the point of bringing this up again, is, you know, what is classified, why is it classified, and the biggest question is, is it still classified now. So that's, you know, the Judge previously denied the request but, you know, so much time has passed now whether this information is still classified or not, what is classified, and then proceeding from there to introduce them at trial because that was the whole point, is that when I am testifying that this would be -- these conversations and audio recordings would be admissible at trial.

THE COURT: Well, there are two separate issues here, one is whether they're properly classified and I have any authority to direct that they be unclassified and I have ruled on that issue before, at least as presented to me, I don't think that there is a basis to direct the government to declassify these things and, in any event, you have provided me no basis to reconsider what sounds like a definitive ruling on that by Judge Crotty. That's a separate question from the CIPA process which requires to you provide notice under Section 5 if you intend to use classified information and then there is a process under CIPA to adjudicate whether and in what form that

information can be used. It does not sound like you are disputing that you have never noticed these recordings under Section 5. So, under Section 5, under CIPA, there is no basis for you to use these at trial because they have never been noticed, let alone properly noticed. So if you want to try and remedy that at this point you can try to remedy that but at the moment it is not ripe for me to rule on it and the deadline for you to provide notice under Section 5 has obviously passed.

Is that the same issue for the Michael memorandum? I don't even know what that is but I don't recall reading about the Michael memorandum in Judge Crotty's prior rulings either.

Mr. Denton, do you know?

MR. DENTON: I'm not sure what the issue is but I can provide some context, your Honor.

The Michael memorandum is also what Judge Crotty referred to in his Rule 29 order as the CIMC memorandum. There was a co-worker of the defendant's who was called as a witness at the last trial who will not be called as a witness at this trial who was placed on administrative leave. Judge Crotty directed us to produce a copy of the memorandum, directing that during the trial. I'm not sure, it has been a while since I have looked at the original version of the memo, I think the version that was introduced at trial was redacted only in ministerial parts and was declassified for introduction at Judge Crotty's very firm insistence. So I'm not sure what the

classification issue is here. We have a separate objections raised in our motions *in limine* about why we don't think it is admissible in the retrial but I don't see that as a CIPA issue, that's just a motion *in limine* issue.

THE COURT: Mr. Schulte, I will obviously take it under advisement in connection with the motions *in limine*, but what is the CIPA issue here?

MR. SCHULTE: The CIPA issue is whether or not -- or basically that I intend to use this material at trial so I have to -- so we have to go through whatever CIPA proceedings, whether or not or what material should be redacted or substituted or --

THE COURT: That sounds like it was declassified and used at the first trial.

MR. SCHULTE: A lot of the material I believe was not declassified so basically what I am trying to litigate is some of this information that was provided to us only as classified and they did it -- it wasn't declassified for the first trial, I basically want to declassify it at this time for trial.

THE COURT: Is there a reason it wasn't in your Section 5 notices?

MR. SCHULTE: Yes.

So, for both of these issues my understanding was they were both in the original CIPA 5 or they were at least litigated pursuant to CIPA before. I mean, I know -- the

Microsoft came in the middle of trial so we had to basically do a quick kind of CIPA litigation there, but my understanding is whatever was previously litigated, there is no point in raising new -- raising a new CIPA 5. That was -- so, for both of these issues, both the Michael and the audio recordings, I want to be clear that I do want to give notice. I know it's kind of late now but I think it's, according to standby counsel, 30 days before trial. We have provided --

THE COURT: It is actually 30 days before trial or whatever deadline the Court sets, and I already set a deadline and that deadline has passed. So you can certainly make late notice if you want and litigate the propriety of that and whether I will allow it but, unless and until you do, there is no reason to adjudicate that.

MR. SCHULTE: So -- I'm sorry.

THE COURT: I just don't understand. Mr. Denton is suggesting that the Michael memorandum or CIMC, whatever it may be called, that there were no substantive redactions, that there were only ministerial redactions. Mr. Schulte is suggesting otherwise, that there were classified information in that.

MR. SCHULTE: I have the documents here --

THE COURT: This is the point of the Section 5 notice, is to make it clear what you propose to use and adjudicate whether you can. But if you have it there and it shows what

was redacted, I'm certainly happy to take a look at it quickly but I just don't know what is going on here.

MR. SCHULTE: I mean it may be, you know, I may be completely mistaken. I thought that whenever I renewed the same objections in the supplemental CIPA 5 my intention or my thought process was all the previous stuff, I can bring any of that to the hearing because it's -- since it has all been previously provided to the Court or the Court has already ruled or reviewed it, my -- perhaps I was mistaken about that, that I could bring any of those materials here to the hearing to basically it review it here.

THE COURT: Well, you are not, except that I have adopted all of Judge Crotty's rulings on that with the exception of the witness protection order I am reserving judgment on. So in that regard, you have renewed your request but I am adhering to his ruling. Is there some particular part of the Michael memorandum you wish to use that you were not permitted to use the last time?

MR. SCHULTE: Yes. I have the documents here I can give to the Court and the government.

THE COURT: Please do.

MR. DENTON: Your Honor, I think I see what the confusion is here.

There was the memorandum from CIMC that Judge Crotty authorized to be introduced at trial. This is a separate

document, this was the [redacted] internal assessment on Michael that Judge Crotty ordered us to produce to the defense as *Giglio* in anticipation of the defense recalling Michael on cross-examination -- which the defense elected not to do. This was never asked to be declassified or introduced in any way so we are talking about two different documents.

MR. SCHULTE: Yes. The issue was that this came in the middle of the trial, it should have been produced to the defense before, and Judge Crotty ruled that this was improperly a violation of *Brady* and so we had to litigate this on the fly in the middle of trial. So my interpretation is this was considered basically part of -- the only reason this stuff didn't come in at trial is because we eventually decided not to recall Michael but I think that the litigation of the relevance of this at trial was basically litigated and that this stuff was ruled to be relevant, we just never were able to recall Michael or go over some of these specific documents.

THE COURT: But the point of the Section 5 notice is so that you can put the government and me on notice of what classified documents or information you wish to use at trial so that we can then proceed to litigate the permissibility of that. So, if this was not subject to any Section 5 notice before the first trial and it wasn't part of your Section 5 notices before this trial, you have not complied with your

obligations under the statute to use this document.

MR. SCHULTE: OK. Am I able to move now? Is the Court willing to look at it now or what is the Court willing to --

THE COURT: I think, as with the recordings, if you want to file a late Section 5 notice you can do that and then if the government wishes to move on procedural ground to preclude you from using it because it is late or filing to comply with my deadline or on the merits, I will take it up. But, unless you have properly noticed it under Section 5 this is not the way this process is supposed to work and I think you have to frame what you are offering it for so that the government can respond in an appropriate fashion.

So the bottom line is it is not ripe for me to consider at this time. If you wish to serve a notice I will take it under advisement whether you can use it and we will go from there, but I don't think it is ripe for me to decide today.

The last item on my agenda is the forensic crime scene. I have only quickly reviewed the submissions thus far. There is a threshold procedural question which is whether the government should be given the unredacted version of the defense expert's affidavit. Mr. Schulte, you didn't respond to that in your reply. I am inclined to think that they should get it, number one, because I don't think there is anything

particularly earth-shattering behind the redactions that the government probably couldn't figure out on its own, but that is to say I'm not sure it reveals much in the way of defense strategy that wouldn't be obvious; and number two, to the extent that you wish to call your expert you would -- I think the government is correct -- need to disclose it by the 13th anyway. So, in that regard, what's the harm in providing it to the government now to give it meaningful opportunity to respond?

MR. SCHULTE: Yes. So I think the issue is that the declaration from the expert is essentially made after he has been able to review -- conduct his examinations and the material that he has found or has, you know, deduced is favorable to the defense. So the issue here is, like -- so this issue happened before where basically the defense had to reveal defense strategy and the expert's proposed test for the government, then the government's expert was able to deduce and find information that it then used against me at trial. So I think the biggest issue here is we don't want to keep repeating that where we keep telling the government here is all the tests that that expert intends to run or here is all the defense strategy and so now give it to your expert to go and conduct these tests yourself or do or find whatever else that is then used against me at trial. So I believe that was the concern, is that he outlines tests that he would perform but we don't

necessarily know what the outcome of those tests would be because we are not able to conduct those tests.

So basically our belief is that, you know, this is not really relevant to the testimony because he can't even testify about this material yet because we don't even have access to it.

THE COURT: But that's the rub. The government says that he does and I think in order to meaningfully respond to his contention that he doesn't, the government has to see what he suggests he can't do with what he has been provided, not to mention you didn't address my point or the government's point that you would be required to disclose the affidavit by the 13th in the event that you intend to call him as a witness. So, if that's the case, what's the harm in disclosing it on May 3rd?

MR. SCHULTE: Yeah, so as -- right.

So, the argument that I raised before is relevant in response to your question, basically why this has to be produced May 13th, why not produce it now. But the thing is the expert's testimony would only be about what he can testify about so none of this would actually be included in that because my expert cannot testify about any of this information. All this affidavit is saying is that these are the tests that he would perform but he is not going to testify to the jury, these are tests that I would perform but I couldn't perform so

we don't think that those materials would be basically produced pursuant to that expert notice. He needs to be able to conduct the task before he would be able to proffer any testimony that would be given to the government on May 13th.

THE COURT: Mr. Denton?

MR. DENTON: Your Honor, I think we think it is pretty obvious that an affidavit of an expert submitted in the case is a prior statement on the subject of his testimony and so it would be 26.2. I think, your Honor, to the extent that what might make sense in order to simply avoid this issue is if the Court wants to ask if there are, you know, review the affidavits that we have submitted and see if the Court thinks that you do need to hear from us more on some of the unredacted portions, we would think we would be entitled to a response. To the extent it is not anything earth-shattering, I think we tried to anticipate as much as we could in discussing with the experts what their affidavits should address. It may be that this is a moot point and the defendant can decide what he wants to do on May 13th. I think we are entitled to it but I am also trying to find ways for there to be less to do here.

THE COURT: I appreciate that.

So let me just turn briefly at least to the merits and I think I would still -- I'm not sure the affidavits accomplished what I hoped they would accomplish which is clarifying the situation because we have a situation where one

expert is saying he needs this in order to meaningfully test what the other experts are doing and so forth and the other experts are saying he doesn't and in that sense it's sort of the affidavits have replicated what the parties' briefs already said. Be that as it may, in the government's letter, page 4, it seems that the government is making available some additional information that was not previously made available, namely an unredacted copy of Confluence -- an April 25th Confluence backup on that basis. Mr. Denton, you state that the defense now has access to the exact same material that Mr. Berger used to conduct his analysis. I guess I am trying to pinpoint precisely what Mr.Berger and Mr. Leedom had and used that was not made available to the defense. Representing that whatever Mr. Berger has reviewed has been made available to the defense, you didn't make that same disclosure with respect to Mr. Leedom, and what is the daylight there.

MR. DENTON: Again, your Honor, some of that is the function of the fact that Mr.Berger performed the more discrete tasks with respect to the timing analysis on Stash and Confluence. He did a lot of unclassified work on the defendant's home computer that is not really at issue, I think. So again, Mr. Berger's expert report specifically identified the sources of data for his conclusions.

Mr. Leedom was not simply just an expert witness, he was part of the investigative team, he was part of the effort

to identify and produce material for discovery. So insofar as the defendant has averred that Mr. Leedom had access to everything the government did, that is by and large true. That's separate and apart from the question of what did he have access to that was relevant and has formed any part of his conclusions that was produced to the defendant. All of that has been produced -- and then some -- in responses to requests from the defendant, Mr. Leedom's own understanding of what might be relevant, a meeting with the defense expert to discuss what material was available and the defendant's expert would like.

So, again, I think the question of what Mr. Leedom had access to versus what is the corpus of relevant information are two different questions and we are confident that the entire corpus of relevant information has been produced.

THE COURT: Mr. Schulte, let me turn to you and kind of in particular I have two concerns. One is the way that it was left with Judge Crotty was denial of your request for access to the full forensic crime scene but without prejudice to a more tailored request, quote unquote. I am not sure that you have satisfied that condition and certainly don't think that Dr. Bellovin's affidavit comes anywhere near it because his affidavit is basically I need all where I have nothing so it is not tailored at all.

Number two, and slightly relatedly, it seems to me

that there are many steps that you and/or your expert could have taken to do more of what has been available and that you haven't availed yourself of to the full extent of what's been provided, to wit, number one, Mr. Leedom states in his affidavit that he made himself available to your expert to discuss what he did, what he reviewed, and what would be available and made clear that he would be available thereafter but was never requested to speak with him again; and number two, there doesn't seem to be any dispute that a substantial amount of information was made available to Dr. Bellovin onsite at the CIA and the stand-alone laptop and that he basically went there on one day and spent very little time reviewing it.

Now, I understand that he would like to review it, for instance, with access to the Internet and what have you, but the fact that it is not under ideal circumstances or conditions what he would want doesn't necessarily mean that you have been deprived of a meaningful opportunity to review it.

So, I guess I have two questions or concerns. One is that you are not making any more of a tailored request before the first trial; and number two, that there is plenty more that could be done with what has been made available and you and your expert haven't availed yourself of it, why should I give you everything when you haven't even availed yourself of what has been made available?

MR. SCHULTE: Yes.

So, the first thing that the government said about the timing analysis I think is incorrect and this comes into play about the more tailored request. So, as the government says, they conducted a timing analysis on Confluence and Stash. They now say that they're going to give us the Confluence backup but not the Stash backup. So, the Stash backup is the more important data. This information is the more sensitive data, this is the data that the more serious charges stem from. So as with regard to more tailored requests, this is specifically the more tailored request, the access to Confluence and Stash backups that were used in the timing analysis that Mr.Berger referenced had to use for his timing analysis. So the fact that they're now agreeing to provide the Confluence we will wait and see what is actually provided but that's, like I said, is a step in the right direction. The other thing is why is there no Stash? Why can we not conduct a timely analysis on Stash? So that's the first thing. The second thing regarding the forensic crime scene, as the Court recalls the, motion made was --

THE COURT: Can I stop you with the first thing because my understanding, this is from paragraph 8 of the Leedom declaration, is that the stand-alone laptop contains unredacted copies of the Stash repositories, unredacted copies of all Stash documents, all Stash commit logs for all projects redacting only the user names of who committed or saved

particular versions and so forth.

So, am I missing something? It seems like that was disclosed.

MR. SCHULTE: So, I mean, it hasn't been produced to us in discovery so I can access it as well. And as far as the redactions to the Stash backup, we don't really know -- Dr. Bellovin, all he knows is that information has been redacted from it because he didn't have a bit for bit copy of it so he can't testify as to the integrity of the data, what has or has not been redacted. So, the government's expert says only certain things have been redacted, but the biggest point is I have a right to review this material. There is nothing in Rule 16 that says the government can only produce it to my expert in some location way far out of the jurisdiction. I have a right to review this material, this is material the government is saying that I stole. I am representing myself and even as a defendant I have a right to review this information. So, the biggest thing is it is not appropriate, there is no case law that the government cites that says this is not appropriate, and there is no reason that the government can't produce this in the SCIF which the whole point of the SCIF is for classified discovery production.

THE COURT: Well, that's a different argument than you haven't been provided this. I think you, by meaning the defense team, you have been provided it, it is just a question

of whether it has been provided to you in the SCIF here as opposed to made available to you which is I think all that Rule 16 actually requires.

But Mr. Denton, now that we have zeroed in on that issue, do you wish to address that? I think the gravamen of the claim is that it doesn't suffice to make it available to Dr. Bellovin in Langley, it has to be provided in the SCIF here so that Mr. Schulte, who is representing himself, can review it himself.

MR. DENTON: So your Honor, think it is helpful to talk about what Stash is. Stash involves the actual repositories of source code for CIA cyber tools, and so that is not something that can be handled just anywhere. It is not something that can be handled on regular SCIF network computers. It is put on an air gap stand-alone laptop because of the sensitivity of how this has to be handled. I think in many cases where defendant's expert is reviewing sensitive material that is not classified, access for the expert and not the defendant himself is the rule, not the exception. The defendant doesn't typically get the sample of cocaine or the gun that an expert needs to sign out to go run his tests on.

I think this is a standard course. I think the government has made it available to the defense and to the defendant's expert. Where we have been able to we made as much as we can available in the SCIF. So, again, the April 25th

Confluence backup the defendant has had the copy of that that was redacted consistent with the Court's Section 4 rulings. We are just now going a step further and also making an unredacted complete copy available to Dr. Bellovin.

Stash we can't really do that for because the Court's Section 4 ruling specifically approved the deletion of source code from the discovery that was produced to the defendant. We are making as much available as we can and making fulsome an opportunity for testing as best we can. We will let Dr. Bellovin come and take a look at it again but it has to be in circumstances that are suitable for control of the sensitivity of the information.

THE COURT: Mr. Schulte?

MR. SCHULTE: So that's not -- the legal standard is not whatever the CIA determines that's the way it's supposed to be provided. I mean, this is a clear case that the defendant has to show certain relevance, materiality, and this information, pursuant to CIPA, the whole point of CIPA is it is supposed to be produced for use by the defendant so this is -- so the government says --

THE COURT: Mr. Schulte, again, the gravamen of your argument is that it has to be produced for you to use in the SCIF here. It is being made available to the defense, which is I think in compliance with Rule 16 by virtue of the fact that your expert has it available to him, albeit not in the SCIF

here. I mean, child pornography can't be just disclosed to defense counsel but if it is made available for inspection in the FBI, you know, then that suffices. Are you aware of any authority that stands for the proposition that a defendant who represents himself, that he has to be taken out of jail and taken to the cocaine to see that it's cocaine when it is made available to his expert? I would think not.

MR. SCHULTE: I think one of the biggest differences here, it is not just that I am representing myself but as a defendant with expertise in this matter, I want to be able to assist. I have --

THE COURT: I understand, but when you went pro se you were explicitly advised by Judge Crotty that by going pro se you were not going to be relieved of the restrictions that were imposed upon you by virtue of being incarcerated and being under SAMs. It wasn't a backdoor way of basically loosening the restrictions imposed on you and you said I understand and I want to proceed pro se anyway.

MR. SCHULTE: This has nothing to do with that.

THE COURT: Well, it does, because you are suggesting that by virtue of having gone pro se you are entitled to be taken to Langley to engage in this review yourself or if that's not an option, that it has to be brought to you and the point is, like, there are legitimate concerns that the CIA has about bringing it here. If those are legitimate but it is being made

available to the defense through your expert in a different location, the fact that you were incarcerated and under SAMs and aren't going to the CIA to review it doesn't strike me as raising a problem if it is available to your expert.

MR. SCHULTE: No, I'm not saying the reason should be that I am representing myself. I said regardless of the fact I am representing myself, I am a defendant with expertise -- technical expertise in this matter. I mean, if a defendant is a forensic science expert and he wants to be able to conduct his own tests, I think he has a right to do that. As someone with the expertise that I have, I am not -- I don't have to just say, OK, let me have my -- hire an expert and let him do it. I want to be able to check the material myself, I want to be able to conduct the test myself. I think I have a right to do that.

THE COURT: Do you have any cases that support that proposition?

MR. SCHULTE: I think it should be the opposite, the government needs to provide cases to suggest that this material can be produced in this manner, that it doesn't have to be provided to the District Court where the criminal proceedings are and it doesn't have to provide materials to the defendant and it can restrict the environment and provide whatever other restrictions it has.

I think the government needs to provide precedent that

shows any of this is lawful. I don't think any other case has been like this where the discovery has been refused to be provided to the defendant or even in the jurisdiction of the district court where the criminal proceedings are ongoing.

THE COURT: Earlier you said that was point number one. What was point number two you wanted to make?

MR. SCHULTE: Regarding -- so there is the Stash and Confluence backups and then there is the other server. So are we proceeding on to those servers or still talking about the backups here?

THE COURT: You said I have two points, one is that they're talking about Confluence but Stash is more important; we have addressed that. I am asking what your second point was that you wanted to make.

MR. SCHULTE: So regarding the Confluence and Stash issue, I think the other unfortunate thing is to note that the redactions -- if the government is removing source code or providing other redactions to the Stash itself, the experts can't really conduct a timing analysis and can't even confirm whether the materials released by Wikileaks are in fact derived from this backup or from this certain date. So, I think the other major issue is that the document, the Stash backup must be provided without redactions so that -- a bit for bit copy so that the witness can confirm that this is the actual data that the government alleges was stolen from the CIA. If whatever

redactions that they propose to do really affect the integrity of the data so that the expert can't really confidently come up and testify about it because he doesn't have a full copy of the actual forensic data to be able to testify. So, that was the other issue, is that if they provide the Stash backup they should provide it completely unredacted so that the expert can actually testify that this is the data that the government alleges was stolen and he conducts his analysis.

THE COURT: Thank you. I will reserve judgment on that issue, too, for the moment.

That exhausts the issues I needed to raise. Anything else from the government, Mr. Denton?

MR. DENTON: Yes, your Honor; one thing.

With regard to the witness protections and witness issues more generally, we will obviously put in the letter -- we will not keep everybody in suspense -- the government intends to call three CIA witnesses at the next trial. They were all people who testified at the previous one. [redacted] We will lay all of that out.

The point that we wanted to flag for the Court is that we understand that the defendant has subpoenaed at least 40 CIA officers who have reported receiving subpoenas. We would expect that witness protections would implicate quite a lot of

them. We also noted this in our motions *in limine* because this happened the last time before the last trial: The defendant subpoenaed, I think, close to 70 witnesses. We would expect -- again, we are still figuring out what the universe is that there would be serious questions about the presentation of cumulative evidence, and we just wanted to flag it for Court because included among defendant's subpoenaed witnesses are a significant number of [redacted] covert officers and within that subset a number of [redacted], and so making arrangements [redacted] doing that in a way that is sufficiently secure as to protect their cover and their ongoing work, is a little bit of something that takes some doing. And so, it's an issue that I think we are trying to figure out the best way to raise with the Court, in advance of the trial, so that we have enough notice on how this is all going to be handled to make those decisions.

I will note that there is at least one witness that the defendant moved to quash the subpoena as to the last time and preclude her testimony. [redacted]

THE COURT: You said the defendant moved to quash.

MR. DENTON: No, the government moved to quash or to preclude her testimony. Judge Crotty did not rule on that because the defense withdrew the subpoena. He did rule on the

motion to quash a subpoena to Secretary Pompeo. But, we expect that we will certainly move to quash the subpoena as to that one woman and may, as to others, but like I said, we are talking about more than 40 people here so figuring out how we are going to resolve this, again, is something I think we need to think about in advance.

MR. SCHULTE: Judge, just one thing, is that when we finish talking about the backups, like I said, I still had another discussion about the remaining server and the motion for preclusion so that was still another issue that we didn't get an opportunity to address the Court on, so I was hoping to be able to address that issue.

THE COURT: OK. Well, I said is there anything else, I was going ask you the same, so you can now address that in a moment but before we get there, I guess Mr. Denton, what are you asking me to do with respect to the defense witnesses? It doesn't seem like it is ripe for me to involve myself in. I confess I haven't bothered to look at the motions *in limine* yet, number one, because I have enough on my plate; number two, the responses aren't in so I don't know whether and to what extent you have addressed it in there but it seems like there has to be an application and I'm not sure there is one at the moment.

MR. DENTON: Your Honor, I think it is a little bit of a challenging circumstance.

We noted in the motion *in limine* that this was an issue that came up before the last trial. We provided a sort of precis of the relevant law and the defendant's obligation to make the necessary showing and the Court's powers with respect to cumulative evidence. I think, again, with respect to the one witness we can certainly say we will file a separate application to preclude her testimony yet again. With respect to the others, I think again, it is a challenging situation because I don't think the government is saying that all of these witnesses should be precluded in toto. I think that 40 is overkill and it is hard to imagine 40 witnesses each with relevant non-cumulative testimony.

So, on the one hand I understand it is the government's burden to move to preclude them. On the other hand, I think our application is basically let's come to a reasonable ground on how many people the defendant should call here and do so in enough time in advance of trial that we can work with the FBI and the CIA to make arrangements for people's safe arrival in New York.

THE COURT: So maybe it makes sense to impose a deadline by which the defendant needs to identify which of those 40 witnesses he actually intends to call so that we can know what, if anything, needs to be litigated.

MR. DENTON: That makes sense, your Honor, to us.

THE COURT: Mr. Schulte?

MS. SHROFF: Your Honor, may I have a second with him?

THE COURT: You may.

MS. SHROFF: Thank you.

MR. SCHULTE: So I think the issue here is the same issue that we had at the first trial where due to the government's restrictions on contacting the witnesses, this is not a typical case where the attorneys can reach out, contact the witnesses, determine specifically what is or what the witnesses would testify, confirm, based on FBI 302s and other information. So because the restrictions imposed by the government, we are not really able to begin this process of whittling down or talking to the witnesses to determine who is going to testify specifically to what or if the testimony is helpful. So due to these restrictions we are not really able to do that.

THE COURT: I think the only restriction is that you need to go through the CISO to contact any of the CIA witnesses and request that they be willing to speak to you. They're not obligated to speak to you. A subpoena doesn't obligate them to speak to you, a subpoena requires them to show up in court. But, you know, at some point you are going to have to decide whether you intend to enforce the subpoena without regard to what the witness would say or not.

MR. SCHULTE: Right. For the first trial, that's where my attorneys were -- when the witnesses came in that were

subpoenaed, they would sit down and speak with them then, right before we were going to begin calling our case and calling the witnesses to testify. So that was the strategy for the first trial that was restricted because of the communication of the CIA.

The CIA, basically, is not allowing the witnesses to communicate with us. As we have said on the record before and Ms. Shroff has said -- she can talk about it again -- but the CIA discovered that certain witnesses were talking with Ms. Shroff, they were removed so she could not speak with them even though they agreed to speak with her. So, the witnesses are not, due to the CIA's issues, are not able to really speak with us and so we will have to do what we did at the first trial which is have counsel speak with them when they come in for testimony at trial.

We do have -- the basis for calling these witnesses is based off 302s where they have made the statements that they've made from 302s and other documents, so the defense spent a long time going through the witnesses to come up with the set that we think that provide substantive, relevant testimony, but then from there we weren't really able to pick out the best ones for use at trial so that was why we relied on that strategy for the first trial.

THE COURT: Mr. Denton?

MR. DENTON: So again, your Honor, what happened the

last time, the defendant shotgunned out 70 subpoenas, we objected to them. The defense ultimately, in order to moot our objection, agreed to narrow the list down to I think it was 12 people that we brought to New York. We, again, agreed to convey the defense's request to speak with those witnesses. The defense spoke with I don't think all of them but a significant number of them and elected to call none of them. I think what we are looking to do is avoid a situation in which we have to bring 40 people-plus, including any number of people that have to be [redacted] just for the defendant to see.

I think it is entirely reasonable to set some date to narrow the list down. We are not saying it has to be a final list, I think we can work with a reasonable number and let the defendant make his decisions at game time about who among that he wants to call but, again, I struggle to see how there would be 40 witnesses in almost any trial that would not have some cumulative effect. So, doing a little bit of that work in advance, makes sense to us.

THE COURT: Yes, Ms. Shroff?

MS. SHROFF: Your Honor, in an average case if there was a witness and there were 40 of them, Mr. Schulte's investigator would go talk to the 40. The lawyer might go to the 40, some other lawyers might go to the other 40. We would whittle down the toilet number from 40 to 4. The problem here

is our investigator can't go to the 40 so the investigator can't come back to Mr. Schulte and say out of the 40, only three are worthwhile but these three are the ones that are worthwhile. So the reason he has to -- and I don't think shotgun is the correct word to use -- but the reason that he asked to speak to all 40 is because that is the only way he can decide which of the 40 are the best witnesses for him which is what happened at the last trial. We didn't subpoena them because we wanted to. We offered to sit down and talk to them. We offered to go to the CIA; Mr. Zass, myself, the investigators. We offered. We don't want to inconvenience anybody. And if they want us to do that again, they can make the 40 available in D.C. if he wasn't going pro se.

So the reason this approach is awkward has nothing to do with the defense being unaccommodating. If they want to make us go to them we are happy to go to them but there is no other way to whittle down the number because we don't know what they would say because we are not able to communicate with them and that is why we asked to do the outreach, so that in the outreach we would have whittled down the number. But, we were not able to.

So I just wanted to make sure and that's -- that what happened at the last trial.

THE COURT: Can we just clarify? Unless I am misremembering, the provisions in the protective order don't

prevent from you conducting outreach, they just require that you go through the CISO to make the request. So, if the witness says I don't want to talk to them, then you are stuck with that and you don't get to make a personal appeal but you weren't prevented from making outreach. Am I wrong?

MS. SHROFF: We were prevented from making outreach because the protective order said that we can't reach out to them directly.

THE COURT: Directly.

MR. SCHULTE: Right.

THE COURT: But you can out reach to them through the CISO. In other words, is there any witness you have not been able to contact and say we are interested in speaking to you, are you willing to conduct an interview with us?

MS. SHROFF: I have, but that is my point -- that a CISO seeking for Mr. Schulte is very different than his advocate speaking for Mr. Schulte. And, the outreach is the most important part. The first time you knock on a witness' door it is important how you convey your need to have that person testify for your client. That is an important aspect. I understand that it superseded in this case because of CIPA and whatever other issues but that was my point, is that the outreach itself sort of ties his hands and I don't even know, because I haven't fully finished the responses, I don't think we have 40 yeses. So I am not really sure we are even at the

stage where Mr. Denton is saying we are at 40 and we are going to waste the time of 40 people. But he has no other way to decide which one of the 40 to call because he simply can't. What is he supposed to do?

THE COURT: Well, for starters, he is supposed to proffer what the witnesses could testify to as a way of whittling down to some non-cumulative number of witnesses. He is not going to call 40 witnesses -- or I think it is very unlikely that he will be permitted to call 40 witnesses so in that regard, whittling it down to some subset of 40 which would not be cumulative as to which he might be entitled to enforce a subpoena does seem like an appropriate course but that does seem to me to warrant setting a deadline to identify which of the 40 he really genuinely wants.

MS. SHROFF: But he has to talk to the 40 to figure out which of the 40 he wants because no. 39 may be a better witness than no. 24. The only way he can figure that out is to talk to 24 and 39. Who is a better witness for you, the only way to know is to talk to the witness.

THE COURT: But, Ms. Shroff, he can't say I'm serving a subpoena on every employee from the CIA and I expect the government to arrange for them -- every single one of them -- [redacted], to be brought to the court house on the first day of trial so I can go through and talk to every employee of the CIA to determine who would be my

best witnesses. That's not the way the system works.

MS. SHROFF: But in this particular case he has no other option. What is the option?

THE COURT: The option is to identify a reasonable number of witnesses who are likely to be called.

MS. SHROFF: Right, but based on what, other than a paper name.

THE COURT: All right.

Well, Mr. Denton, I am not sure how to proceed here except to say maybe you should go ahead and make a motion and if you want to argue that the 40 are cumulative and then he can respond why they're not cumulative and/or have to identify which of them he really wants now then I will adjudicate that but I'm not sure how else to proceed.

MR. DENTON: That's fine, your Honor; we can make an application.

Like I said, our application is not that he doesn't get to call any witnesses, I think it is more an application to reach a reasonable scope so we will figure out the best way to do that and file something.

THE COURT: And I would encourage you, to the extent that there are communications between the two sides these days to talk to one another about it and try to reach an accommodation. I agree Mr. Schulte should be entitled to call subpoenaed witness as any criminal defendant is, but it doesn't

allow him, for instance, to serve a subpoena on every employee of the CIA. Something between and that and zero seems appropriate because this is really a process question and when he needs to identify which witnesses he wants to call and to allow the government a reasonable amount of time to make the necessary arrangements. I would add, just not [redacted], but I don't know what the COVID restrictions are with respect to [redacted] these days and coming into the court house but that is something you will also need to keep in mind, that somebody who is subpoenaed [redacted] cannot come into the court house and testify when they are brought [redacted]

Ms. Shroff?

MS. SHROFF: Your Honor, we would ask the CIA to provide to Mr. Schulte the exact language they used to e-mail each of the people subpoenaed. They declined so we asked, through the CISO, that the material be preserved in case Mr. Schulte wants to pursue an appeal based on that. And we just ask the Court to receive that information *in camera* because it won't be shared with us.

THE COURT: All right.

Mr. Denton, why shouldn't it be shared with them?

MR. DENTON: I honestly don't know, your Honor. This is all happening with the wall folks, this is not something that we have been involved in so I'm really not sure what is

going on with that. So, I can ask and try find out what is going on.

THE COURT: Why don't you ask and try to find out what's going on. Maybe everybody should be able to see it. And to the extent Mr. Schulte takes issue with it, he can raise it and regardless, I would think it should be made part of the record in some fashion or form. So, see if you can sort that out.

MR. DENTON: I do want to say, your Honor, we have been very careful to observe the wall limitations here. When I say the number 40, that is the number of people who were provided with the subpoena and then, in turn, reported having received it pursuant to the regulations. That's the only way we are getting this. We have been very careful about the wall procedures.

THE COURT: Understood.

All right, Mr. Schulte. You had one other issue you wanted to raise before we conclude?

MR. SCHULTE: Yes. Well, just a continuation of the expert affidavits and the servers.

So we discussed the Stash and Confluence backups already, we have already addressed that issue, but the other big issue was the servers, the ESXi server, the Episode 1 server, and the CIA work station.

So, the big issue here is that it is not only -- the

original motion was not only to produce certain servers but it was also to preclude the government, in the case that we are not able to review them. So the biggest issue here is Mr. Leedom's testimony. I know the government said of course he had access to everything because he was part of the investigation team. So the issue here is Mr. Leedom picked out -- he went through, conducted forensic examinations of the servers, and based on those examinations he picked out the files that he said were relevant or he picked out the data that he thinks was relevant and he picked out -- he came up with this timeline of events and had a huge PowerPoint presentation about this.

The biggest issue here is the defendant is, essentially, not able to call any expert because the information that he picks out as relevant, just like when it comes to forensic science, the expert can be mistaken or as I have stated in here either -- could even deliberately exclude information or kick out information or we have no idea how he is conducting it which is why, when it comes to forensic science, the defense is allowed to conduct his own analysis on the fingerprints, the DNA, or whatever.

So, digital forensics is the same when it comes to forensic science. We don't know what Mr. Leedom missed. He doesn't have a Ph.D, he doesn't have the credentials that Dr. Bellovin has, so Dr. Bellovin should be allowed to review

the servers at the crux of this issue here that the government says this is their case-in-chief, they are saying I have these servers, it is the main server with the Computer Fraud and Use Act charges, the main servers with the Espionage Act. And so, our expert wants the ability to conduct the same tests that Mr. Leedom did and to rely upon his same expertise and to rely upon his knowledge from his extensive years of experience in this field to see -- to be able to conduct a similar examination and I think the law is clear when it comes to forensic science that this is how it should be conducted and I think digital forensic is not any different at all than the forensic science.

THE COURT: Mr. Schulte, you are sort of repeating yourself and repeating arguments that you have already made, either both in writing or orally. I understood you to be trying to raise or discuss a narrower point which is the point you make on page 5 of your reply, that my CIA work station, the ESXi server and the FS-01 server, that the government's response didn't address those.

Is that the argument that you were trying to make?

MR. SCHULTE: You are talking about in the reply that I -- regarding the affidavits?

THE COURT: Yes; that you filed yesterday.

In other words, I get your argument. I understand in your expert's affidavit makes the case for why complete access

to the full mirror image or forensic image or whatever terms should be used is necessary. I get it. Maybe I will agree with you, maybe I won't agree with you. I get that. But you don't need to repeat the argument. I understood you to be making narrower point that hadn't been made.

MR. SCHULTE: We never discussed the server, we only discussed the two backups so I basically wanted to touch base on this orally and to say that, essentially, without this, I don't know how the Court will rule one way or the other but my expert is either, without access to this can either only not testify at all or he can only testify that he wasn't provided the material so he was not able to conduct any test. So I don't know how the jury is going to perceive that but I just wanted to be clear that I am basically forced that I can't really have an expert testify at all if that is the case.

THE COURT: What is the "this" is the point. We have discussed Stash and Confluence. I get that. The "this" is?

MR. SCHULTE: The three servers.

THE COURT: CIA work station, FS-01, and ESXi?

MR. SCHULTE: Correct.

THE COURT: Mr. Denton?

MR. DENTON: Your Honor, that's the precise request that Judge Crotty denied, in fact it is broader than the request that Judge Crotty denied. Judge Crotty denied the request for the entirety of his CIA work station and the ESXi

server. The government's affidavits and letter do address these, this is the bulk of Mr. Leedom's affidavit about log files and identifying various parts of these servers. There is a little terminological inexactitude, the FS-01 is also called the NetApp, things like that. But I think at the end of the day, like I said, this is just the request that Judge Crotty denied already.

THE COURT: And denied at?

MR. SCHULTE: I think --

THE COURT: Docket entry 124 and 514?

MR. DENTON: Yes, your Honor.

MR. SCHULTE: The issue, I think originally it was a request for DevLAN was the request. So this is not a request for DevLAN, this is a request for three specific servers. In addition, the point is that there was an additional argument made that the government should then be precluded if the Court is going to agree that the material is too classified to present to the defense that the argument is, well, the government should be precluded from relying on that same testimony or evidence that was not provided to the defense.

THE COURT: OK. I get that and that's the motion that you made and it is under advisement.

Mr. Denton, is there anything else you want to say on that score?

MR. DENTON: No, your Honor. I think Docket entry 514

has some discussion about the relationship between the earlier request for all of DevLAN and requests for these three servers in particular.

THE COURT: All right. I will take a look at that.

Anything else, Mr. Schulte?

MR. SCHULTE: I don't think so, no.

THE COURT: So, I have made a couple rulings, otherwise I will take the other items under advisement and tell you how I am proceeding, whether that is a definitive decision, whether we need to have further hearings under 6(c) or otherwise. I just need to figure out where I stand on these things and we will go from there. I have plenty of work to do, you have plenty of work to do, and we will go from there.

Thank you very much. Thank you for your patience. Have a good day.

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